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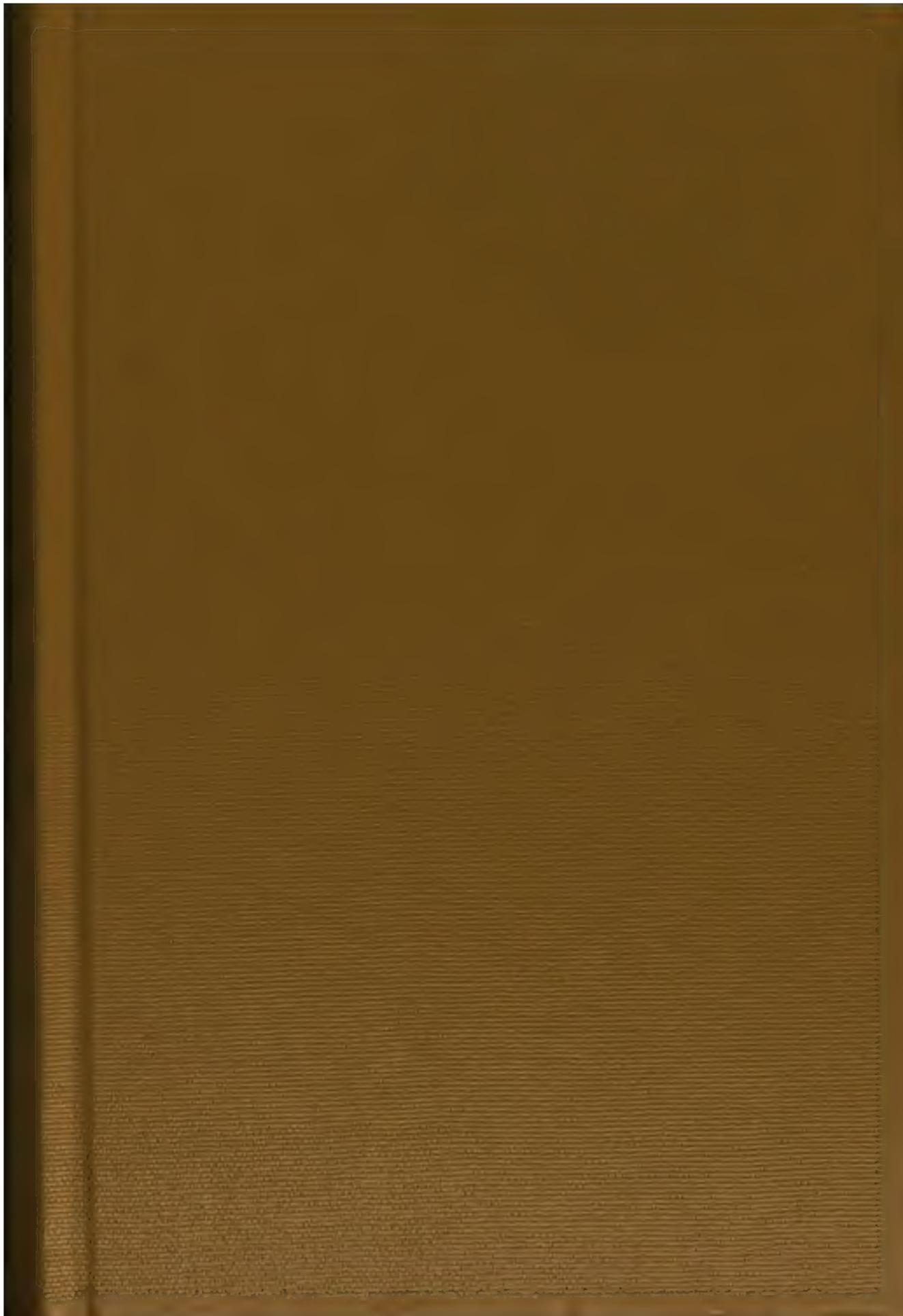
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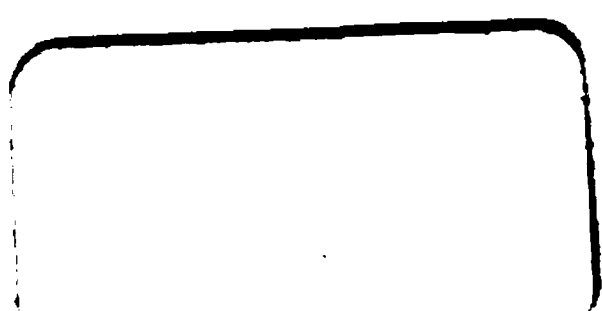
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BENJAMIN'S

Treatise on the Law

OF

SALES OF PERSONAL PROPERTY:

WITH REFERENCES TO THE

AMERICAN DECISIONS, AND TO THE FRENCH
CODE AND CIVIL LAW.

Third Edition.

BROUGHT DOWN TO THE END OF THE YEAR 1888 (WITH THE
AUTHOR'S SANCTION AND REVISION)

BY

ARTHUR BEILBY PEARSON, B.A.,
(*Of Trinity Hall, Cambridge*)

AND

HUGH FENWICK, BOYD,
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OF THE INNER TEMPLE, BARRISTERS-AT-LAW.

WITH AMERICAN NOTES BY JAMES M. KERR,

EDITOR OF "AMERICAN AND ENGLISH RAILROAD CASES," AND THE "AMERICAN AND
ENGLISH CORPORATION CASES."

BOSTON:

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1888.

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TO THE
Honorable Francis A. Macomber, LL.D.,
ONE OF THE JUSTICES OF THE SUPREME COURT OF THE STATE OF
NEW YORK,
THIS EDITION OF *BENJAMIN ON SALES*
IS RESPECTFULLY INSCRIBED
BY THE *EDITOR.*

AMERICAN EDITOR'S PREFACE.

IN the preparation of this edition of Benjamin on Sales from the last English edition the editor has endeavored to give a complete view of the American law regulating the sale of personal property, pointing out wherein it may differ from the English law as laid down in the text. To do this, it was not thought desirable, as it certainly was not practicable, in the time allowed in which to do the work, to cite all the numerous American cases upon all points discussed. But an effort has been made to discuss fully close and delicate points and unsettled questions. It has been thought desirable to distribute the matter throughout the volumes in the shape of notes appended to the particular point in the text to which they apply. Throughout the work, for the convenience of ready reference, the authorities have been arranged alphabetically by states, and in the states numerically in the inverse order. In the discussion of important and unsettled questions the decisions of the states are, so far as practicable, kept separate, and the states arranged alphabetically. Later English and Canadian cases have been added. The citations have all been verified, and no pains spared to make the work as perfect as possible and complete to the date of going to press.

In the contents and the analysis at the beginning of each chapter, the reference is to the paging of the English edition — the star-paging of this edition. In the index and tables of cases, the pages given are the foot-paging to this edition.

JAMES M. KERR.

September, 1888.

PREFACE TO THE THIRD EDITION.

IN presenting a New Edition of "Benjamin on Sale," the Editors must crave a full measure of indulgence, by reason of the difficulties with which they have had to contend through the enforced retirement of the learned Author from the Profession. It was Mr. Benjamin's intention to have revised the Work throughout as it passed through the press, and he had accordingly revised and approved the Editor's labors up to the end of the Chapter on Delivery (page *689), when his health gave way, and he was interdicted by his physicians from any further work, and ordered absolute repose and cessation from all intellectual fatigue. Under these circumstances the Editors are compelled to issue the Work as completed by themselves.

In accordance with the Author's desire, the text of the last Edition has been retained, and all fresh matter, other than that inserted in the Notes, is included in brackets. This course, whilst entailing the retention of some portions of the Work the subject-matter of which has been rendered obsolete by later decisions and statutes, is in the opinion of the Editors justified, by reason of the high value which has attached to the text of the Treatise. It must also be remembered that the learned Author had not at his disposal the leisure time necessary for re-casting the Work.

The passing of the Bills of Sale Acts, 1878 and 1882, rendered it necessary to re-write the portion of the Work which deals with the subject of Bills of Sale. And, in doing so, attention has been paid to the recent cases in which the latter statute has received judicial interpretation.

The Married Women's Property Act, 1882, and the Bankruptcy Act, 1883, so far as they affect the subject-matter of the Treatise, have also been taken into consideration.

The more important decisions of the Supreme Court of the United States, and of the Court of Appeals in the State of New York, together with some decisions of the other States on the subject of the Book, have been noticed.

The Index, in the compilation of which the Editors are indebted for assistance to their friend Mr. F. J. Frankau, barrister-at-law, has been very much enlarged, and will, it is thought, be found complete.

In conclusion, the Editors express the earnest hope that their work may not have impaired the high reputation which "Benjamin on Sale" has won in America, as well as in this country.

A. B. P.

H. F. B.

TEMPLE,

January, 1884.

PREFACE TO THE SECOND EDITION.

IN this Second Edition, the numerous important decisions which have been given since the publication of this Treatise in 1868, have been carefully noted, and some anterior authorities which had escaped the author's research have been added.

The favorable reception given to the work in the United States has encouraged the insertion of a larger number of American decisions ; but in order to avoid an unnecessary increase in the bulk of the volume, reference has generally been confined to the latest leading case in the Reports of the Supreme Court of the United States, and of the Court of Appeals in the State of New York. This will suffice to guide the reader to the authorities in the Courts of the other States.

TEMPLE,

July, 1873.

PREFACE TO THE FIRST EDITION.

IF the well-known treatise of Mr. Justice Blackburn had been designed by its learned Author to embrace the whole law on the subject of sale of goods, nothing further would now be needed by the practitioner than a new edition of that admirable work, incorporating the later statutes and decisions, so as to afford a connected view of the modifications necessarily introduced by lapse of time into the law of a contract so perpetually recurring as that of sale. But unfortunately for the Profession, Blackburn on Sale was intentionally restricted in its scope, and is confined to an examination of the effect of the contract only, and of the legal rights of property and possession in goods.

This treatise is an attempt to develop the principles applicable to all branches of the subject, while following Blackburn on Sale as a model for guidance in the treatment of such topics as are embraced in that work. An effort has been made to afford some compensation for the imperfections of the attempt, by references to American decisions, and to the authorities in the Civil law, not elsewhere so readily accessible.

TEMPLE,

August, 1868.

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BENJAMIN'S
SALE OF PERSONAL PROPERTY.

SALE OF PERSONAL PROPERTY.

BOOK I.

FORMATION OF THE CONTRACT.

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§ 1. By the common law a sale of personal property is usually termed a “bargain and sale of goods.” It may be defined to be a transfer of the *absolute or general* property in a thing for a price in *money*.¹ Hence it follows, that

¹ *Definitions.* — Blackstone’s definition is, “a transmutation of property from one man to another in consideration of some price.” 2 Bl. 446. Kent’s is, “a contract for the transfer of property from one person to another for a valuable consideration.” 2 Kent, 468, 12th ed. This definition would include barter, which, though in most respects analogous, is certainly not identical, with sale. Whether the contracts of barter (*permutatio*) and sale (*emptio-venditio*) were essentially different, was for a long time a moot point with the two rival schools of Roman jurists. Gaius, professing to be a Sabinian, maintained, from the purely historical point of view, that there was no distinction, barter being only the most ancient form of the

[*2] to constitute * a valid sale, there must be a concurrence of the following elements, viz: (1st) Parties

contract of sale. Justinian, however, adopted and promulgated the opinion of the school of Proculus, that price was of the essence of the contract of sale; and barter was relegated to the class of real contracts. *Vide* Gaius, lib. iii. 140; Inst. lib. iii. c. 23; D. lib. xviii. c. 3. The dispute was one of some practical importance, owing to the consequences which flowed from the distinction in the Roman law between real and consensual contracts.

To constitute a sale there must be an intention on the one part to buy, and on the other to sell; *Binford v. Adams*, 104 Ind. 41; s. c. 1 West Rep. 911, 914; see *Smith v. Sawyer*, 55 Me. 139; *Willis v. Hobson*, 37 Me. 405; *Greening v. Patten*, 51 Wis. 150; a mutual assent of the parties on the object and the price, *Nance v. Metcalf*, 19 Mo. App. 183; s. c. 1 West Rep. 441; it is a transfer of the absolute or general property in the thing, for a price in money, *Nance v. Metcalf*, 19 Mo. App. 183; s. c. 1 West Rep. 441.

The Supreme Court of the United States say in *Williamson v. Barry*: "We remark that *sale* is a word of precise legal import, both at law and in equity; it means at all times a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller, for the thing bought and sold." See *Noy's Maxims*, ch. 42; *Shep. Touch.* 244. This language of the Supreme Court of the United States is quoted with approval in *Bigley v. Risher*, 63 Pa. St. 152, 155. See also *Huthmacher v. Harris's Adm'r*, 38 Pa. St. 491; s. c. 80 Am. Dec. 502; also *Parkinson v. State*, 14 Md. 184; s. c. 74 Am. Dec. 522. See *Massey v. State*, 74 Ind. 368; *Edwards v. Cottrell*, 43 Iowa, 194, 204; *Gardner v. Lane*, 94 Mass. (12 Allen) 39; *De Fonclear v. Shottenkirk*, 3 Johns.

(N. Y.) 170; *Wittkowsky v. Wasson*, 71 N. C. 451; *Mackaness v. Long*, 85 Pa. St. 158, 163; *Bigley v. Risher*, 63 Pa. St. 152, 155; *Huthmacher v. Harris*, 38 Pa. St. 491, 498; s. c. 80 Am. Dec. 502; *Atkinson on Sales*, 5. A sale has also been described as an agreement by which one of the contracting parties, called the seller, gives a thing and passes title to it, in exchange for a certain price in money, to another party, who is termed the buyer or purchaser, and who on his part agrees to pay such price. *Eldredge v. Kuehl*, 27 Iowa, 160, 173; *Madison Avenue, &c. v. Baptist Church*, 46 N. Y. 131, 139; 2 *Bouv. Law Dict.* (15th ed.) tit. Sale, 606; *Winfield Words, &c.* 547; *La. Civ. Code*, art. 2439; *Stims. Am. Stat.* 4560.

If the consideration be other than money, as the giving of other goods, it would constitute a technical barter. However, the legal effect is generally the same, and the same rule of law is applicable to both. *Commonwealth v. Clark*, 80 Mass. (14 Gray) 372; *Nance v. Metcalf*, 1 Mo. App. 183; s. c. 1 West Rep. 441. The Supreme Court of Vermont say, in the case of *State v. O'Neil*, 58 Vt. 140; s. c. 1 New Eng. Rep. 775, 781, that "the owner must intend to part with his property, and the purchaser to become the immediate owner; their two minds must meet on this point; and if anything remains to be done, before their assent, it may be an inchoate contract, but it is not a perfect contract of sale." See, also *Mason v. Thompson*, 35 Mass. (18 Pick.) 305. *Phillips, P. J.*, of the Kansas City Court of Appeals, says, in the recent case of *Nance v. Metcalf*, 19 Mo. App. 183; s. c. 1 West Rep. 442, that "at common law all bargains and sale of personal property is a transfer of the absolute or general property in the thing, for a price in money." Com-

competent to contract;² (2d) Mutual assent;³ (3d) A thing,⁴ the absolute or general property in which is transferred from the seller to the buyer; and (4th) A price in

monwealth v. Clark, 80 Mass. (14 Gray) 372. The Supreme Court of Massachusetts have said that "the ordinary definition of a sale is a transmutation of property from one person to another for a price, does not fully express the essential elements which enter into and make up a contract; a more complete enumeration of this would be competent parties to enter into the contract, an agreement to sell, and the mutual assent of the parties to the subject-matter of the sale, and to the price to be paid therefor." *Gardner v. Lane*, 94 Mass. (12 Allen) 39, 43. The Supreme Court of Iowa say, in the case of *Eldridge v. Kuehl*, 27 Iowa, 160, 173, that "the word 'sale' is defined by Bouvier in his law dictionary to be an agreement by one of the contracting parties called the seller, gives a thing and passes the title to it for a certain price, in current money, to the other party, who is called the buyer or purchaser, who on his part agrees to pay such price."

The Connecticut doctrine. — In Connecticut a sale is said to be "a transmutation of property from one to another, accompanied whenever it is applicable, with a delivery of the article to the purchaser. *Patten v. Smith*, 5 Conn. 196, 199; s. c. 10 Am. Dec. 166. It is so much of the essence of a sale, that there be a delivery of the possession that to permit the chattel sold to remain in the hands of the vendor is an extraordinary exception to the usual course of dealing, and requires a satisfactory explanation. *Patten v. Smith*, 5 Conn. 196, 199; s. c. 10 Am. Dec. 166. See also *Law on Sales*, 1; *Hilliard on Sales*, 1. However, the limitations contained in this opinion are not in accord with the prevailing

doctrine in this country, where the contract of sale does not provide for the delivery by the vendor.

² See *Gardner v. Lane*. 14 Mass. (12 Allen) 39, 43.

³ *Consent of parties.* — Consent or mutual assent is essential (*Gardner v. Lane*, 94 Mass. (12 Allen) 39, 43; *Schermerhorn v. Talman*, 14 N. Y. 29, 47; *Thayer v. Lucas*, 22 Ohio St. 62; *Dayton W. V. & X. Turnp. Co. v. Coy*, 13 Ohio St. 84, 92; *Summers v. Mills*, 21 Tex. 77, 86, 87; *Utley v. Donaldson*, 94 U. S. (4 Otto) 29, 47, bk. 24, L. ed. 54; 2 Kent Com. 477; *Long on Sales*, 3); because a contract always implies the agreement or assent of two minds. See *Smith v. Goudy*, 90 Mass. (8 Allen) 566; *Thurston v. Thurston*, 55 Mass. (1 Cush.) 89, 91; *infra*, § 46. At common law the only elements essential to a valid sale of personal property were first, a thing to be sold; second, a price to be paid; and third, the mutual consent of the parties. *Cunningham v. Asterbrook*, 53 Mo. 553, 556; *Bloxam v. Sanders*, 4 Barn. & C. 941, 948; 2 Bl. Com. 448. The civil law as followed in this country is the same. *Kleinpeter v. Harrison*, 21 La. An. 196, 197; Ga. Civ. Code, § 2629; La. Civ. Code, art. 2439. A recent writer says that "the civil law, as it was ultimately developed, and is now administered on the continent of Europe, agrees with the natural in deriving the obligation of a contract from the union of two minds in a common purpose to which both are mutually bound, or which one of them is entitled to insist that the other shall fulfil." *Hare on Cont.* 117.

⁴ At common law a delivery of the goods was not an essential element in a sale. *Newmarket on Sales*, § 3; *Johns. Cyc.* 1647.

money paid or promised.⁵ That it requires (1st) parties competent to contract, and (2d) mutual assent in order to effect a sale, is manifest from the general principles which govern all contracts. The third essential is that there should be a transfer of the *absolute or general* property in the thing sold; for in law, a thing may in some cases be said to have in a certain sense two owners, one of whom has the general, and the other a special property in it; and a transfer of the special property is not a sale of the thing.⁶ An illustration

⁵ A consideration paid or promised is essential to a valid sale. *Commonwealth v. Packard*, 71 Mass. (5 Gray) 101.

⁶ A sale is a present transfer of the title to a chattel for a consideration in money, and is therefore distinguishable from

1. A lease, in which the transfer of title is only temporary. *Smith v. Niles*, 20 Vt. 315; s. c. 49 Am. Dec. 782. Where chattel property delivered under a writing, purporting to hire the same at so much per month, and when a certain amount is paid in monthly advances, or otherwise agreeing to sell and deliver the property, the transaction constitutes a sale. *Lucas v. Campbell*, 88 Ill. 447; *Murch v. Wright*, 46 Ill. 487; *McCormick v. Hadden*, 37 Ill. 370; *Brundage v. Camp*, 21 Ill. 330; *Jennings v. Gage*, 13 Ill. 610; s. c. 56 Am. Dec. 476; *Singer Manufacturing Co. v. Cole*, 4 Lea (Tenn.) 439; s. c. 40 Am. Rep. 20; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. (3 Otto) 664; bk. 33, L. ed. 1003. And parol evidence is admissible to show that upon compliance of the condition of the sale, the title vests. *Singer Sewing Machine Co. v. Holcomb*, 40 Iowa, 33; *Domestic Sewing Machine Co. v. Anderson*, 33 Minn. 57. However, where by the terms of such written instrument, the title is to remain in the vendor until the price is fully paid, the transaction is a conditional sale. *Kohler v. Hayes*, 41 Cal. 455; *Loomis v. Bragg*, 50

Conn. 228; s. c. 47 Am. Rep. 638; *Hine v. Roberts*, 48 Conn. 267; s. c. 40 Am. Rep. 170; *Greer v. Church*, 13 Bush (Ky.) 430, 433, 434; *Currer v. Knapp*, 117 Mass. 324; *Mars-ton v. Baldwin*, 17 Mass. 606; *Hussey v. Thornton*, 4 Mass. 405; s. c. 3 Am. Dec. 224; *Sargent v. Gile*, 8 N. H. 325; *Ballard v. Burgett*, 40 N. Y. 314; *Gibbons v. Luke*, 37 Hun (N. Y.) 576; *Murray v. Burling*, 10 Johns. (N. Y.) 172; *Spencer v. Blackman*, 9 Wend. (N. Y.) 167; *Singer Machine Co. v. Graham*, 8 Oreg. 17; s. c. 34 Am. Rep. 572; *Enlow v. Klein*, 79 Pa. St. 488; *Crist v. Kleber*, 79 Pa. St. 290; *Rose v. Story*, 1 Pa. St. 190; s. c. 44 Am. Dec. 121; *Clark v. Jack*, 7 Watts (Pa.) 375; *Carpenter v. Scott*, 13 R. I. 477; *Goodell v. Fair-brother*, 12 R. I. 233; s. c. 34 Am. Rep. 631; *Collender v. Marshall*, 57 Vt. 232; *Whitcomb v. Woodworth*, 54 Vt. 544. *Vide infra*, § 389, "Conditional Sale." The courts enforce these contracts according to their plain terms. *Sumner v. Cottey*, 71 Mo. 121; *Bailey v. Colby*, 34 N. H. 29; *Sargent v. Gile*, 8 N. H. 325; *Bean v. Edge*, 84 N. Y. 510; *Austin v. Dye*, 46 N. Y. 500; *Haviland v. Johnson*, 7 Daly (N. Y.) 297; *Enlow v. Klein*, 79 Pa. St. 488; *Crist v. Kleber*, 79 Pa. St. 290; *Henry v. Patterson*, 57 Pa. St. 346; *Rowe v. Sharp*, 51 Pa. St. 26; *Chamberlain v. Smith*, 44 Pa. St. 431; *Myers v. Har-vey*, 2 Penrose & Watts (Pa.) 479; *Rose v. Story*, 1 Pa. St. 190; *Clark v. Jack*, 7 Watts (Pa.) 375. However,

of this is presented in the case of *Jenkins v. Brown*,⁷ where a factor in New Orleans bought a cargo of corn with his own

⁷ 14 Q. B. 496; 19 L. J. Q. B. 286.

a contrary doctrine seems to be held in *Heryford v. Davis*, 102 U. S. (12 Otto) 235; bk. 26, L. ed. 160; *Hervey v. Rhode Island Locomotive Works*, 93 U. S. (3 Otto) 664; bk. 23, L. ed. 1003; *Fosdick v. Schall*, 99 U. S. (9 Otto) 235; bk. 25, L. ed. 339. In Illinois and Kentucky, leases of the class in question are held to be chattel mortgages in spite of their terms. *Murch v. Wright*, 46 Ill. 487, cited and followed in *Hervey v. Rhode Island Locomotive Works*, 93 U. S. (3 Otto) 664; bk. 23, L. ed. 103; *Lucas v. Campbell*, 88 Ill. 447; *Greer v. Church*, 13 Bush (Ky.) 430.

2. A mortgage in which the title passes at once, defeasible, on performance of a specific condition. *Merrifield v. Baker*, 9 Mass. (9 Allen) 29; *Merrill v. Chase*, 85 Mass. (3 Allen) 339; *Holman v. Bailey*, 44 Mass. (3 Metc.) 55; *Erskine v. Townsend*, 2 Mass. 495. No release or discharge of the mortgage, or reconveyance by the mortgagee, is necessary. *Richardson v. Cambridge*, 84 Mass. (2 Allen) 118; *Holman v. Bailey*, 44 Mass. (3 Metc.) 55.

The fact whether the debt is satisfied by the transaction determines whether it is a sale, a pledge, or a mortgage. *Moore v. Murdock*, 26 Cal. 514; *Hickox v. Lowe*, 10 Cal. 197; *Sutphen v. Cushman*, 35 Ill. 186, 196; *Reeves v. Sebern*, 16 Iowa, 234; *Cooper v. Brock*, 41 Mich. 488; *Slowey v. McMurray*, 27 Mo. 113; *Wilmerding v. Mitchell*, 42 N. J. L. (13 Vr.) 476; *Smith v. Beattie*, 31 N. Y. 542; *Robinson v. Willoughby*, 65 N. C. 520; *Todd v. Campbell*, 32 Pa. St. 250; *Houser v. Kemp*, 3 Pa. St. 208; *Ruffler v. Womack*, 30 Tex. 332; *Musgat v. Rumpelly*, 46 Wis. 660.

It is held that a bill of sale whereby a debtor conveys personal property to his creditor, and which provides

that the property shall remain in the debtor's possession, and that he have thirty days to redeem by paying the debt, is a mortgage. *Blodgett v. Blodgett*, 48 Vt. 32. See also *Coty v. Barnes*, 20 Vt. 78; *Atwater v. Mower*, 10 Vt. 75; *Wood v. Dudley*, 8 Vt. 430. In *Blodgett v. Blodgett*, *supra*, the court say: "The appellant was indebted to the appellee at the time the conveyance was made, and there is no evidence whatever of the discharge of that indebtedness. The bond and note, by which the greater portion of it was evidenced, were retained by the appellee, and the payment of the indebtedness might have been enforced. Until the contrary is shown the presumption is that the debt was not satisfied by the conveyance."

3. A bailment, in which only a qualified or special interest passes. See *Bulkley v. Andrews*, 39 Conn. 70; *Ashby v. West*, 3 Ind. 170; *Irons v. Kentner*, 51 Iowa, 88; *Barker v. Roberts*, 8 Me. (8 Greenl.) 101; *Mansfield v. Converse*, 90 Mass. (8 Allen) 182; *Schenck v. Saunders*, 79 Mass. (13 Gray) 37; *Eldredge v. Benson*, 61 Mass. (7 Cush.) 483; *Foster v. Pettibone*, 7 N. Y. 433; *Mallory v. Willis*, 4 N. Y. 76; *Hyde v. Cookson*, 21 Barb. (N. Y.) 92; *Pierce v. Schenck*, 3 Hill (N. Y.) 28; *Brown v. Hitchcock*, 28 Vt. 452; *Isaacs v. Andrews*, 28 Up. Can. C. P. 40; *Stephenson v. Ranney*, 2 Up. Can. C. P. 196.

Where the bailee agrees to pay a specified price in case the property is not returned, this does not convert the contract of bailment into one of sale; the specification of value does not operate to give an election to the vendee to retain, at the price, or to return, but simply fixes the damages in case of failure or inability to re-

money, on the order of a London correspondent. He shipped the goods for account of his correspondent, and wrote letters

turn the article. *Westcott v. Thompson*, 18 N. Y. 363. See *Hunt v. Wyman*, 100 Mass. 198, where it appeared, from the evidence, that the plaintiff had a horse for sale, and that the defendant asked and was told the price and character of the horse; that the defendant then expressed a desire to take the horse and try it, and proposed that "if the plaintiff would let him take the horse and try it, if he did not like it he would return it in as good condition as he got it, the night of the day he took it." To this proposition the plaintiff assented, and delivered the horse to the defendant's servant. The horse escaped from the servant almost immediately, without his fault, and was so injured that the defendant had no opportunity to try it, but did not return it within the time agreed upon nor afterwards. The plaintiff testified that he did not expect that the defendant would finally take the horse until after he had tried it. It was held that this evidence showed a bailment of the horse, but no sale. The court said: "This contract, it is true, is silent as to what was to take place if the defendant should like the horse, or if he should not return it. It may perhaps be fairly inferred that the intent was that if he did like the horse he was to become the purchaser at the price named. But, even if that were expressed, the sale would not take effect until the defendant should determine the question of his liking. An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return. A mere failure to return the horse within the time agreed may be a breach of con-

tract, upon which the plaintiff is entitled to an appropriate remedy; but has no such legal effect as to convert the bailment into a sale." See also *Bulkley v. Andrews*, 39 Conn. 70; *Walker v. Butterick*, 105 Mass. 237; *Prichett v. Cook*, 62 Pa. St. 193; *Fuller v. Buswell*, 34 Vt. 107.

Where the return of the identical article is not required by usage, trade, or the agreement of the parties, but its equivalent in the same or a different form, and in case of failure, this value is to be paid at the option of the receiver, the transaction is a sale. Particularly is this true where there is an express right to sell deposits, or consume the article received. *Bailey v. Bensley*, 87 Ill. 556; *Richardson v. Olmstead*, 74 Ill. 213; *Lonergan v. Stewart*, 55 Ill. 45; *Ives v. Hartley*, 51 Ill. 520; *Grier v. Stout*, 2 Ill. App. 602; *Carlisle v. Wallace*, 12 Ind. 252; *Ewing v. French*, 1 Blackf. (Ind.) 354; *Johnson v. Browne*, 37 Iowa, 200; *Wilson v. Cooper*, 10 Iowa, 565; *Buffum v. Merry*, 3 Mas. C. C. 478; *Jones v. Kemp*, 49 Mich. 9; *Fishback v. Van Dusen*, 33 Minn. 111; *Norton v. Woodruff*, 2 N. Y. 153; *Baker v. Woodruff*, 2 Barb. (N. Y.) 520; *Marsh v. Titus*, 3 Hun (N. Y.) 550; *Seymour v. Brown*, 19 Johns. (N. Y.) 44; *Reed v. Abbey*, 2 T. & C. (N. Y.) 380; *Smith v. Clark*, 21 Wend. (N. Y.) 83; *Chase v. Washburn*, 1 Ohio St. 244; *Butterfield v. Lathrop*, 71 Pa. St. 226; *Schlesinger v. Stratton*, 9 R. I. 578; *Slaughter v. Green*, 1 Rand (Va.) 3; *Austin v. Seligman*, 21 Blatchf. C. C. 506; *McCabe v. McKingstry*, 5 Dill. C. C. 509; *Rahilly v. Wilson*, 3 Dill. C. C. 420; *Benedict v. Ker*, 29 Up. Can. C. P. 410; *Tilt v. Silverthorn*, 11 Up. Can. Q. B. 619; *Good v. Winslow*, 4 Allen (N. B.) 241. In some of the states this matter is now regulated by statute.

of advice to that effect, and sent invoices to the correspondent, and drew bills of exchange on him for the price,

At risk of owner. — The delivery of property which is to remain at the owner's risk is a bailment and not a sale. See *Nelson v. Brown*, 53 Iowa, 555; s. c. 44 Iowa, 455; *Sexton v. Graham*, 53 Iowa, 183; *Johnston v. Browne*, 37 Iowa, 200; *Ledyard v. Hibbard*, 48 Mich. 421.

A loan or lease of personal property, which has been kept for a certain time and is subject then to be turned into a sale, by paying a stipulated price and a payment "of rent" for usage, in case of non-payment of the price constitutes a bailment, and not a sale. *Dando v. Foulds*, 105 Pa. St. 74; *Enlow v. Klein*, 79 Pa. St. 488; *Crist v. Kleber*, 79 Pa. St. 290; *Becker v. Smith*, 59 Pa. St. 469; *Rowe v. Sharp*, 51 Pa. St. 26; *Henderson v. Luack*, 21 Pa. St. 359; *Linton v. Butz*, 7 Pa. St. 89; s. c. 47 Am. Dec. 501; *Myers v. Harvey*, 2 Pen. & W. (Pa.) 478; s. c. 23 Am. Dec. 60; *Rose v. Story*, 1 Pa. St. 190; s. c. 44 Am. Dec. 121; *Martin v. Mathiot*, 14 Serg. & R. (Pa.) 214; s. c. 16 Am. Dec. 491; *Clark v. Jack*, 7 Watts (Pa.) 375; *Vandyke v. Christ*, 7 Watts & S. (Pa.) 373.

4. *A consignment of goods to be sold*, which is a bailment and not a sale. *Williams v. Davis*, 47 Iowa, 363; *Bayliss v. Davis*, 47 Iowa, 340; *Conable v. Lynch*, 45 Iowa, 84; *Boston & M. R. R. v. Warriar Mower Co.*, 76 Me. 251; *Blood v. Palmer*, 11 Me. 414; *Selden v. Beale*, 3 Me. (3 Greenl.) 178; *Walker v. Butterick*, 105 Mass. 237; *Audenried v. Betteley*, 90 Mass. (8 Allen) 302; *Brown v. Holbrook*, 70 Mass. (4 Gray) 102; *Ayres v. Sleeper*, 48 Mass. (7 Metc.) 45; *Meldrum v. Snow*, 26 Mass. (9 Pick.) 441; *Morss v. Stone*, 5 Barb. (N. Y.) 516; *Gooderham v. Marlat*, 14 Up. Can. Q. B. 228; *Dodds v. Durand*, 5 Up. Can. Q. B. 623. And this is true although the consignment

is coupled with a *del credere* commission. See *Converville Co. v. Chambersburg Co.*, 14 Hun (N. Y.) 609. To constitute a consignment of sale the purchaser must become the principal debtor at the time of the transaction. *Nutter v. Wheeler*, 2 Low. C. C. 346; followed in *re Linforth*, 4 Sawy. C. C. 370; *Ex parte White*, L. R. 6 App. Cas. 397; s. c. 21 W. R. 465. See also *Audenried v. Betteley*, 90 Mass. (8 Allen) 302; *Ex parte Carlon*, 4 Dea. & Ch. 120; *Ex parte Barkworth*, 2 De G. & J. 194; *Ex parte Seargeant*, 1 Rose, 153. The fact that the value is stated in the invoice accompanying the goods, will not indicate that the property was sold and not consigned. *Pam v. Vilmar*, 54 How. (N. Y.) Pr. 235. See *McElrath's Words and Phrases*, tits. "Invoice," "Contracts of sale or return."

"*Contracts of sale or return.*" — Where property is delivered to the purchaser, for the purpose of trial or inspecting it, the transaction constitutes a bailment until after the exercise of the option of purchase given to the person to whom it is delivered. *Colton v. Wise*, 7 Ill. App. 395; *Wartman v. Breed*, 117 Mass. 18; *Hunt v. Wyman*, 100 Mass. 198; *Denny v. Williams*, 87 Mass. (5 Allen) 1; *O'Kelly v. O'Kelly*, 49 Mass. (8 Metc.) 436; *Dando v. Foulds*, 105 Pa. St. 74. But see *Westcott v. Thompson*, 18 N. Y. 363; *Krause v. Commonwealth*, 93 Pa. St. 418; s. c. 39 Am. Rep. 762; *Fuller v. Buswell*, 34 Vt. 107; *Heryford v. Davis*, 102 U. S. (12 Otto) 235; bk. 26, L. ed. 160. But such trial or inspection must be made within a reasonable time, otherwise the sale becomes absolute. See *Johnson v. McLane*, 7 Blackf. (Ind.) 501; s. c. 42 Am. Dec. 102; *Jameson v. Gregory*, 4 Met. (Ky.) 363; *Ray v. Thomp-*

but took bills of lading to his own order, and endorsed and delivered them to a banker to whom he sold the bills of

son, 66 Mass. (12 Cush.) 281; s. c. 59 Am. Dec. 187; Quinn v. Stout, 31 Mo. 160; Depew v. Keyser, 3 Duer. (N. Y.) 336; Marsh v. Wickham, 14 Johns. (N. Y.) 167; McEntyre v. McEntyre, 12 Ired. (N. C.) L. 299; Moore v. Piercy, 1 Jones (N. C.) L. 131; Schlesinger v. Stratton, 9 R. I. 578; Washington v. Johnson, 7 Humph. (Tenn.) 468; Fairfield v. Madison Manuf. Co., 38 Wis. 346; Moss v. Sweet, 16 Ad. & E. N. S. 493; s. c. 3 Eng. L. & Eq. 311; Beverley v. Lincoln Gaslight Co., 6 A. & E. 829; Bianchi v. Nash, 1 Mees. & W. 545.

There is a distinction between a case where goods are delivered with an option to purchase, if satisfied, and a purchase with an option to return if not satisfied, for where goods are taken under an agreement that they may return within a specified time, if not found to be as represented or the purchaser not satisfied with them, it is a sale under a "contract of sale or return," and the title passes at once to the purchaser (Walker v. Blake, 37 Me. 373; Perkins v. Douglass, 20 Me. 317; Buswell v. Bicknell, 17 Me. 344; s. c. 35 Am. Dec. 262; Dearborn v. Turner, 16 Me. 17; s. c. 33 Am. Dec. 630; Holbrook v. Armstrong, 10 Me. 31; McKinney v. Bradley, 117 Mass. 321; Marsh v. Wickham, 14 Johns. (N. Y.) 167); subject to his option to return them. Colton v. Wise, 7 Ill. App. 395; Dearborn v. Turner, 16 Me. 17; s. c. 33 Am. Dec. 630; Orcutt v. Nelson, 67 Mass. (1 Gray) 536; Schlesinger v. Stratton, 9 R. I. 578. But where goods are delivered with an option to purchase, if satisfied, the title does not pass until the option has been exercised. Mowbray v. Cady, 40 Iowa, 604; Wilson v. Stratton, 47 Me. 120; Crane v. Roberts, 5 Me. 419; Hunt v. Wyman, 100 Mass.

198; Grout v. Hill, 70 Mass. (4 Gray) 361; McArren v. McNulty, 73 Mass. (7 Gray) 139; Chamberlain v. Smith, 44 Pa. St. 431; Kahn v. Klambunde, 50 Wis. 235; Fairfield v. Madison Manuf. Co., 38 Wis. 346; Elphick v. Barnes, L. R. 5 C. P. Div. 321. Because the transaction closely resembles a sale with a right to repurchase, in which case the title fully passes. Mahler v. Schloss, 7 Daly (N. Y.) 291; Slutz v. Desenberg, 28 Ohio St. 372; Moore v. Sibbald, 29 Up. Can. Q. B. 487. However, it would be otherwise under a special agreement to the contrary. Crocker v. Gullifer, 44 Me. 491.

A deposit of grain with the warehouseman.—Where grain is deposited with a warehouseman, with the understanding that he is to ship and sell it on his own account, and when the depositor desires to sell, the warehouseman will pay the highest price or return a like quantity and quality, the transaction is not a bailment, but a sale, and the property passes to the warehouseman. Broadwell v. Howard, 77 Ill. 305; Barker v. Bushnell, 75 Ill. 220; Lonergan v. Stewart, 55 Ill. 45; German Bank v. Meadowcroft, 4 Ill. App. 630; Lyon v. Lenon, 106 Ind. 567; Schindler v. Westover, 99 Ind. 395; Rice v. Nixon, 97 Ind. 97; Carlisle v. Wallace, 12 Ind. 252; s. c. 74 Am. Dec. 207; Arthur v. Chicago, R. I. & P. Ry. Co., 61 Iowa, 648; Nelson v. Brown, 53 Iowa, 555; s. c. 44 Iowa, 455; Johnston v. Browne, 37 Iowa, 200; Wilson v. Cooper, 10 Iowa, 565; Cushing v. Breed, 96 Mass. (14 Allen) 376; Ledyard v. Hibbard, 48 Mich. 421; s. c. 42 Am. Rep. 474; Norton v. Woodruff, 2 N. Y. 155; Hurd v. West, 7 Cow. (N. Y.) 752; Smith v. Clark, 21 Wend. (N. Y.) 84; s. c. 34 Am. Dec. 213; Chase v. Washburn, 1

exchange. This transaction was held to be a transfer of the general property to the London merchant, and therefore a

Ohio St. 244; s. c. 59 Am. Dec. 623; South Australian Ins. Co. v. Randell, L. R. 3 P. C. Ap. 101. But it is held in the case of Sexton v. Graham, 53 Iowa, 181, that where grain is delivered to a warehouseman, on a receipt taken which provides that the grain may be stored in the common mass, with other grain of the same quality, the contract is one of bailment and not of sale, although the warehouseman himself continued buying and adding grain, on his own account to the common mass, and shipping therefrom.

Consignment for sale. — Where goods are delivered to another on condition that he will return monthly, an account of sales, at the price charged by the vendor, who agrees to furnish all the goods required, this constitutes a consignment and not a sale. Reissner v. Oxley, 80 Ind. 580; Balch v. Ashton, 54 Iowa, 123; Williams v. Davis, 47 Iowa, 363; Bayliss v. Davis, 47 Iowa, 340; Conable v. Lynch, 45 Iowa, 84; Albert v. Lindau, 46 Md. 334; Walker v. Butterick, 105 Mass. 237; Audenried v. Betteley, 90 Mass. (8 Allen) 302; Pam v. Vilmar, 54 How. (N. Y.) Pr. 235; Converseville Co. v. Chambersburg Co., 14 Hun (N. Y.) 609; Nutter v. Wheeler, 2 Low. C. C. 346; In re Linforth, 4 Sawy. C. C. 370; Gooderham v. Marlatt, 14 Up. Can. Q. B. 228; Ex parte White, L. R. 6 Ch. App. 397. In Walker v. Butterick, 105 Mass. 238, the court said: "The terms of the contract that A & Co. are to take goods from plaintiffs, and return to them every thirty days the amount of sales at the prices charged by the plaintiffs, who will furnish A & Co. all goods in their line, imports a consignment and not a sale." But in Nutter v. Wheeler, 2 Low. C. C. 346, where goods were delivered on an agreement that they should be paid for at a

certain price within thirty days after they were sold by the consignee, who fixed the terms of his own sales, it was held that the consignee should be considered as the purchaser, subject only to the understanding that he was neither the owner of the goods nor liable to pay for them until he had succeeded in finding a purchaser; but when he did sell, he immediately became the principal, and the defendants ceased to have the rights of a consignor, and could not follow the goods or their proceeds as undisclosed principals. The latter case is followed in In re Linforth, 4 Sawy. C. C. 370. Where goods are to remain the vendor's until payment of the purchase price, title does not pass until that condition is performed. Cole v. Mann, 62 N. Y. 1; Ballard v. Burgett, 40 N. Y. 314; Herring v. Hippock, 15 N. Y. 409.

Goods to be paid for at all events. — Where goods are delivered to a merchant or agent to be resold, on the condition that they are to be paid for as sold, but in all events to be paid for, within a specified time, the transaction is a present sale. Fish v. Benedict, 74 N. Y. 613. See Bayliss v. Davis, 47 Ia. 340; Eldridge v. Benson, 61 Mass. (7 Cush.) 483; Cole v. Mann, 62 N. Y. 1; Marlatt v. Gooderham, 14 Up. Can. Q. B. 221; Dodds v. Durand, 5 Up. Can. Q. B. 623; but where the contract provided that the party should act as agent of another for the sale of machines, paying a stipulated price for whatever he received, and that if any remained unsold at the end of the season he should give his note therefor, and if the right was not continued another season, the machines unsold should be returned, it was held that the agent acquired no title to the machines received under the contract, and that a sale of them to him was not contemplated by the parties. Wil-

sale to him; and a transfer of a special property to the banker by the delivery to him of the bills of lading, which represented the goods.

And in like manner when goods are delivered in pawn or

liams v. Davis, 47 Ia. 363; where a merchant received goods to be sold on commission, to be accounted for as sold, and anything remaining unsold to be returned on demand, it was held that an action for goods sold and delivered would not lie. Dodds v. Durant, 5 Up. Can. Q. B. 623.

The words "I hereby agree to sell" or "to buy" do not import or purchase sale where the article bargained is already in the importer's possession. Martin v. Adams, 104 Mass. 262. See Brock v. O'Donnell, 45 N. J. L. (16 Vr.) 441. A written agreement by the terms of which "A sells" and "B buys" is not necessarily a present sale. Sherwin v. Mudge, 127 Mass. 547; because the contract may be simply executory. Foster v. Ropes, 111 Mass. 10; The Dresser Manuf. Co. v. Waterston, 44 Mass. (3 Metc.) 9; Riddle v. Varnum, 37 Mass. (20 Pick.) 280; Mason v. Thompson, 35 Mass. (18 Pick.) 305; Higgins v. Chessman, 26 Mass. (9 Pick.) 7; Kelley v. Upton, 5 Duer (N. Y.) 336. Such cases depend upon the intention of the parties, and this intention must be collected from the whole instrument. McCrae v. Young, 43 Ala. 622; Foster v. Ropes, 111 Mass. 10, 16; Macomber v. Parker, 30 Mass. (13 Pick.) 182; Anderson v. Reed, 51 N. Y. Super. Ct. (19 J. & S.) 326; Decker v. Furniss, 14 N. Y. 615; Outwater v. Dodge, 7 Cow. (N. Y.) 85; Kelley v. Upton, 5 Duer (N. Y.) 336; McDonald v. Hewett, 15 Johns. (N. Y.) 349; s. c. 8 Am. Dec. 241; Currie v. White, 1 Sweeny (N. Y.) 192; Ward v. Shaw, 7 Wend. (N. Y.) 404; Turley v. Bates, 2 H. & C. 200; Young v. Matthews, L. R. 2 C. P. 127; Busk v. Davis, 2 Maule & S. 397; and in order to carry that intention into effect, the literal import of the words

used may be disregarded. Kelley v. Upton, 5 Duer (N. Y.) 336.

5. *A contract to sell in future, which is invalid.* Cardinell v. Bennett, 52 Cal. 476; Olney v. Howe, 89 Ill. 556; Lester v. East, 49 Ind. 588; Dittmar v. Norman, 118 Mass. 319; Elliott v. Stoddard, 98 Mass. 145; Blasdell v. Souther, 72 Mass. (6 Gray) 152; Joyce v. Murphy, 8 N. Y. 291; Garbract v. Commonwealth, 96 Pa. St. 449; Powder Co. v. Burkhardt, 90 U. S. (7 Otto) 110; bk. 24, L. ed. 973. See Chapman v. Searle, 20 Mass. (3 Pick.) 38; Hodges v. Harris, 23 Mass. (6 Pick.) 360; Shaw v. Hudd, 25 Mass. (8 Pick.) 9; Bennett v. Platt, 26 Mass. (9 Pick.) 558; Pratt v. Parkham, 41 Mass. (24 Pick.) 42; Moody v. Wright, 54 Mass. (13 Metc.) 717; Willson v. Russell, 136 Mass. 211; Hibblewhite v. McMorine, 5 Mees. & W. 462. The words "I hereby agree to sell" and "to buy" do not necessarily import a future sale; and especially is this true where the article bargained to be sold is already in the grantor's possession. See Martin v. Adams, 104 Mass. 262; Brock v. O'Donnell, 45 N. J. L. (16 Vr.) 441; and it has been held that where by the terms of a contract "A sells" and "B buys," the transaction is not necessarily a present sale. Sherwin v. Mudge, 127 Mass. 547. Because the implication of the immediate transfer of title suggested by these words may be controlled by other languages or subsequent provisions, which indicate an executory contract of sale. See Foster v. Ropes, 111 Mass. 10, 16; Dresser Manuf. Co. v. Waterson, 44 Mass. (3 Metc.) 9; Riddle v. Varnum, 37 Mass. (20 Pick.) 280; Mason v. Thompson, 35 Mass. (18 Pick.) 325; Higgins v. Chessman, 26 Mass. (9 Pick.) 7, 10; Kelley v.

pledge, the general property remains in the pawnor, and a special property is transferred to the pawnee.⁸

Upton, 5 Duer (N. Y.) 340. In such cases the character of the transaction depends upon the intention of the parties, which is always to be obtained from the circumstances. See *McCrae v. Young*, 43 Ala. 622; *Decker v. Furniss*, 14 N. Y. 615; *Outwater v. Dodge*, 7 Cow. (N. Y.) 85; *McDonald v. Hewett*, 15 Johns. (N. Y.) 349; *Ward v. Shaw*, 7 Wend. (N. Y.) 404; *Anderson v. Reed*, 19 Jones & S. (N. Y. Super. Ct.) 236; *Currie v. White*, 1 Sweeney (N. Y.) 192; *Busk v. Davis*, 2 Maule & S. 397.

⁸ *Halliday v. Holgate*, L. R. 3 Ex. 299; *Harper v. Goodsell*, L. R. 5 Q. B. 424.

The Supreme Court of Illinois say that "where property is pledged, the pledgee acquires a special property in the goods, and we are aware of no reason or principle that would prevent a transfer, nor can we perceive any reason why the mere transfer of the pledged property should destroy the original lien. *Belden v. Perkins*, 78 Ill. 449, 451.

Pledge of property — General title. — Where property is pledged, the general title remains in the pledgor, and the special title passes to the pledgee. *Whitaker v. Sumner*, 37 Mass. (20 Pick.) 399; *Fettyplace v. Dutch*, 30 Mass. (13 Pick.) 388; s. c. 23 Am. Dec. 688; *Tutsworth v. Moore*, 26 Mass. (9 Pick.) 347; s. c. 20 Am. Dec. 479; *Jarvis v. Rogers*, 15 Mass. 389; *Carrington v. Ward*, 71 N. Y. 360; *Van Blarcom v. Broadway Bank*, 37 N. Y. 540; *Cortelyou v. Lansing*, 2 Cai. Cas. (N. Y.) 200; *Garlic v. James*, 12 Johns. (N. Y.) 146; s. c. 7 Am. Dec. 294; see also *Talty v. Freedman's Savings & Trust Co.*, 93 U. S. (3 Otto) 321; bk. 23, L. ed. 420; *Jack v. Eagles*, 2 Allen (N. B.) 95; *Gibbson v. Boyd*, 1 Kerr (N. B.) 150; the pledgee is entitled to the possession of the property pledged as

against the pledgor and all the world, except in these cases where the property has been pledged without the owner's consent. *Noles v. Marable*, 50 Ala. 366; *Reese v. Harris*, 27 Ala. 301; *Lawrence v. Maxwell*, 53 N. Y. 19; *Thompson v. Patrick*, 4 Watts (Pa.) 414; *Coleman v. Shelton*, 2 McC. (S. C.) Eq. 123, 126; *Lockett v. Townsend*, 3 Tex. 119; s. c. 49 Am. Dec. 723; *Phillips v. Robinson*, 4 Bing. 106; 2 Par. on Cont. 110.

But the pledgee may use the property pledged, "(1) If the pawn is of such a nature that the due preservation of it requires some use, there such use is not only justified, but it is indispensable to the faithful discharge of the duty of the pawnee. (2) If the pawn is of such a nature that it will be worse for the use, such, for instance, as the wearing of clothes which are deposited, there the use is prohibited to the pawnee. (3) If the pawn is of such a nature that the keeping is a charge on the pawnee, as if it is a cow or a horse, there the pawnee may milk the cow and use the milk, and ride the horse, by way of recompense (as it is said) for the keeping. (4) If the use will be beneficial to the pawn, or it is indifferent, there it seems that the pawnee may use it; as, if the pawn is of a setting dog, it may well be presumed that the owner would consent to the dog's being used in partridge-shooting, and thus confirmed in the habits which make him valuable. So books, which will not be injured by a moderate use, may be read, examined, and used by the pawnee. (5) If the use will be without any injury, and yet the pawn will be exposed to extraordinary perils, there the use is impliedly interdicted." See also *Jones on Bail*. 81; *Story on Bail*. secs. 329, 330. The pledgee must return the identical article pledged where it is distinctive

§ 2. So in relation to the element of price.¹ It must be *money*, paid or promised, accordingly as the agreement may be for a cash,² or a credit sale;³ but if any other considera-

in its character, and capable of being recognised among other things of like nature, or where a mark is set upon it with a view to its discrimination; but not where from its very nature it is incapable of being indented, if it is once mingled with others of the same kind. *Nourse v. Prime*, 4 Johns. Ch. (N. Y.) 490; s. c. 8 Am. Dec. 606; *Gilpin v. Howell*, 5 Pa. St. 41; s. c. 45 Am. Dec. 720. Where stock is pledged and the shares transferred to the pledgee on the books of the corporation, and such pledgee surrenders the certificates and takes out new certificates in his own name, the identity of the stock is not changed. *Ketchum v. Bank of Commerce*, 19 N. Y. 499. The pledgor may redeem the property pledged at any time where no time is fixed to redeem. In general his right to redeem commences when the debt falls due. *Roberts v. Sykes*, 30 Barb. (N. Y.) 173; *Waterman v. Brown*, 31 Pa. St. 161. The right of redemption in the pledgor survives in his personal representation. *Perry v. Craig*, 3 Mo. 516; *Cortelyou v. Lansing*, 2 Cai. Cas. (N. Y.) 200. However, in Texas it is held that the statute of limitations does not begin to run against the right to redeem the pledge until the pledgee has denoted by some act his intention to put an end to the contract. See *Jones v. Thurmond*, 5 Tex. 318. Where the pledgee refuses to redeliver the articles pledged, and demand after payment of the debt, the pledgor may bring an action against him at law to recover possession; and under some circumstances, as where the identity is necessary, or where the pledged article has been assigned, the pledgee may bring a suit in equity to redeem. *Flowers v. Sproule*, 2 A. K. Marsh. (Ky.) 54; *Bartlett v. Johnson*, 9

Allen (Mass.) 530; *Merrill v. Houghton*, 51 N. H. 61; *White Mts. R. R. v. Bay State Iron Co.*, 50 N. H. 57; *Hasbrouck v. Vandervoort*, 4 Sandf. (N. Y.) 74; *Conyngham's Appeal*, 57 Pa. St. 474; *Chapman v. Turner*, 1 Call. (Va.) 280; *Brown v. Runals*, 14 Wis. 693; *Jones v. Smith*, 2 Ves. Jr. 372.

Barter of goods.—Assumpsit for goods sold and delivered will not lie where there has been a mere barter and exchange of goods, and no sum in money has been agreed upon as a value of the goods exchanged. *Fuller v. Duren*, 36 Ala. 73; s. c. 76 Am. Dec. 318; *Gunter v. Leckey*, 39 Ala. 591, 596; *Slayton v. McDonald*, 73 Me. 50; *Jones v. Hoar*, 22 Mass. (5 Pick.) 285; *Mitchell v. Gile*, 12 N. H. 390; *Willet v. Willet*, 3 Watts (Pa.), 277; *Vail v. Strong*, 10 Vt. 465; *Williamson v. Berry*, 49 U. S. (8 How.) 544, bk. 12, L. ed. 1191; *Campbell v. Sewell*, 1 Chit. 611; *Harris v. Fowle*, 1 N. B. 287. The remedy is by an action upon the contract of exchange. *Slayton v. McDonald*, 73 Me. 50; *Holden Steam Mill Co. v. Westervelt*, 67 Me. 446, 450; *Mitchell v. Gile*, 12 N. H. 390; *Dubois v. Delaware & H. Canal Co.* 4 Wend. (N. Y.) 285; *Robertson v. Lynch*, 18 Johns. (N. Y.) 457; *Clark v. Smith*, 14 Johns. (N. Y.) 326; *Jennings v. Camp*, 13 Johns. (N. Y.) 94; *Raymond v. Bearnard*, 12 Johns. (N. Y.) 274, 289; s. c. 7 Am. Dec. 317; *Talver v. West. Holt*, 178; *Weston v. Downes*, Dougl. 23.

¹ *Vide infra*, § 99.

² Where one sells goods to be paid for in cash, no time of payment being specified, payment and delivery are simultaneous acts, and the vendor may refuse to part with the goods until payment. And delivery without payment in such case passes the property, and the vendee may avail

tion than money be given, it is not a sale. If goods be given in exchange for goods, it is a barter.⁴ So also goods

himself of any legal set-off, notwithstanding his agreement to pay ready money. *Chapman v. Lathrop*, 6 Cow. (N. Y.) 110; s. c. 16 Am. Dec. 433.

³ It is not necessary that the price be fixed to constitute a sale in those cases where the property is delivered, because the law implies a promise to pay the value; and it is held that "a delivery of certain articles in consideration of being paid what they are worth, constitutes a sale." *Hill v. Hill*, 1 N. J. L. (Coxe) 261; s. c. 1 Am. Dec. 206. See *Herbert v. Borstow*, 1 Salk. 25; s. c. 2 Ld. Raym. 895.

⁴ *The difference between a sale and a barter or exchange* is that in the former the price is paid in money. See *Williamson v. Berry*, 49 U. S. (8 How.) 544; bk. 12, L. ed. 1170, 1191; and in the latter it is paid in goods. Thus it has been held that an exchange of liquor for goods or labor is a "sale within the meaning of the statute prohibiting the sale of liquor." *Howard v. Harris*, 90 Mass. (8 Allen) 297; *Com. v. Clark*, 80 Mass. (14 Gray) 367; *Mason v. Lothrop*, 73 Mass. (7 Gray) 355. However, a contrary doctrine prevails in Indiana. See *Stevenson v. State*, 65 Ind. 409. As a general thing the same rules apply to a barter or exchange that apply to a sale. See *Dowling v. McKenney*, 124 Mass. 480; *Howard v. Harris*, 90 Mass. (8 Allen) 297; *Com. v. Clark*, 80 Mass. (14 Gray) 372. However, there is this difference between the remedy on a contract of sale and that on that of an exchange or barter, where there has been a breach: in the latter case the declaration of the breach must be special, but not so in the former. *Massey v. The State*, 74 Ind. 368; *Stevenson v. The State*, 65 Ind. 409; *Edwards v. Cottrell*, 43 Iowa, 194; *Slayton v. McDonald*, 73 Me. 50;

Mitchell v. Gile, 12 N. H. 390; *Weart v. Hoagland*, 22 N. J. L. (2 Zab.) 517; *Loomis v. Wainwright*, 21 Vt. 520; *Vail v. Strong*, 10 Vt. 457; *Williamson v. Berry*, 49 U. S. (8 How.) 495, 544; bk. 12, L. ed. 1170, 1191; *Anon.* 3 Salk. 157; 2 Bl. Com. 446, 447. An allegation in an assumpsit for "goods sold and delivered" will not be supported by proof of a mere barter or exchange. See *Fuller v. Duren*, 36 Ala. 73; *Gunter v. Leckey*, 30 Ala. 596; *Slayton v. McDonald*, 73 Me. 50; *Mitchell v. Gile*, 12 N. H. 390; *Vail v. Strong*, 10 Vt. 465; *Campbell v. Sewell*, 1 Chitt. 611; *Harris v. Fowle*, 1 N. B. L. 287. But it seems that where the value of the things to be exchanged have been agreed upon by the parties. See *Clarke v. Fairchild*, 22 Wend. (N. Y.) 576; *Porter v. Talcott*, 1 Cow. (N. Y.) 359; *Herrick v. Carter*, 56 Barb. (N. Y.) 41; *Pickard v. McCormick*, 11 Mich. 69; *Weiss v. Maunch Chunk Iron Co.*, 58 Pa. St. 295, 301; *White v. Thompson*, 52 Pa. St. 363; *Crockett v. Moore*, 3 Sneed (Tenn.) 145; *Butcher v. Carlisle*, 12 Gratt. (Va.) 521; *Way v. Wakefield*, 7 Vt. 228; *Forsyth v. Jervis*, 1 Stark. 437. An agreed price, not being essential to a barter, indicates a sale. *Loomis v. Wainwright*, 21 Vt. 520. Where the price is fixed, this is not conclusive. *Bradford v. Stewart*, Minor (Ala.) 44; *Henry v. Gamble*, Minor (Ala.) 15; *Jeffrey v. Underwood*, 1 Ark. 108; *Mattox v. Craig*, 2 Bibb (Ky.) 584; *Bruner v. Kelsoe*, 1 Bibb (Ky.) 487; *Watson v. McNairy*, 1 Bibb (Ky.) 356; *Noe v. Preston*, 5 J. J. Marsh. (Ky.) 57; *Bollinger v. Thurston*, 2 Const. (S. C.) 447; *Young v. Hawkins*, 4 Yerg. (Tenn.) 171; *Bloomfield v. Hancock*, 1 Yerg. (Tenn.) 101; *Butcher v. Carlisle*, 12 Gratt. (Va.) 520, 522; *Beirne v. Dunlap*, 8

[*3] may be given *in consideration of work and labor done, or for rent, or for board and lodging,⁵ or any valuable consideration other than money; all of which are contracts for the transfer of the general and absolute property in the thing, but they are not sales of goods. The legal effects of such special contracts, as well as of barter, on the rights of the parties are generally, but not always, the same as in the case of sales.⁶ If no valuable consideration be given for the transfer, it is a gift,⁷ not a sale.

Leigh (Va.) 514. It has been held that one in whom the owner vests authority to sell property thereby obtains no authority to barter it; thus a mortgage of a chattel with power of sale confers no right to exchange the mortgaged property for other property. *Edwards v. Cottrell*, 43 Iowa, 194, 204.

⁵ See an example in *Keys v. Harwood*, 2 C. B. 905.

⁶ For cases showing distinction between sale and barter, see *Harris v. Fowle*, cited in *Barb v. Parker*, 1 H. Bl. 287; *Hands v. Burton*, 9 East, 349; *Harrison v. Luke*, 14 M. & W. 139; *Sheldon v. Cox*, 3 B. & C. 420; *Guerreiro v. Peile*, 3 B. & Ald. 616; *Forsyth v. Jervis*, 1 Stark. 437; *Read v. Hutchinson*, 3 Camp. 352.

⁷ *Parol gifts of personal chattels* do not pass the property, if there be no actual delivery to the donee. *Irons v. Smallpiece*, 2 B. & A. 551; *Shower v. Pilch*, 4 Ex. 478; *Douglas v. Douglas*, 22 L. T. N. S. 127; *Power v. Cook*, 4 Ir. R. C. L. 247. As to gifts of money by check, see *Bromley v. Brunton*, 6 Eq. 275, and cases there cited; *Jones v. Lock*, 1 Ch. 25; *In re Beak's Estate*, 13 Eq. 489; *Rolls v. Pearce*, 5 Ch. D. 730. And as to gift of a bond without delivery, see *Morgan v. Malleson*, 10 Eq. 475, and cases there cited. In *Morgan v. Malleson*, the court treated a gift, which was imperfect by reason of non-delivery, as an effectual declaration of trust; but this decision, although approved by *Malins V.C.*

in *Baddeley v. Baddeley*, 9 Ch. D. 113, is opposed to the current of recent authorities. *Warriner v. Rogers*, 16 Eq. 340; *Richards v. Delbridge*, 18 Eq. 11; *Moore v. Moore*, *ib.* 474; *Heartley v. Nicholson*, 19 Eq. 233; *In re Breton's Estate*, 17 Ch. D. 416.

In the case of a mere gift the tendency of the American cases is to hold that it is not valid without there has been an actual delivery. And this is true not only of gifts *inter vivos*, but also of gifts *causa mortis*. *Connor v. Trawick*, 37 Ala. 289; *Sims v. Sims*, 2 Ala. 117; *Wheeler v. Wheeler*, 43 Conn. 503; *Camp's Appeal*, 36 Conn. 88, 92; *Hill v. Sheibley*, 64 Ga. 529; *People v. Johnson*, 14 Ill. 342; *Hatton v. Jones*, 78 Ind. 466; *Foglesong v. Wickard*, 75 Ind. 258; *Slade v. Leonard*, 75 Ind. 172; *Trowbridge v. Holden*, 58 Me. 117; *Wing v. Merchant*, 57 Me. 383; *Hanson v. Millett*, 55 Me. 184; *Dole v. Lincoln*, 31 Me. 422; *Allen v. Polearczky*, 31 Me. 338; *Borneman v. Sidlinger*, 15 Me. 429; *Taylor v. Henry*, 48 Md. 550; *Hitch v. Davis*, 3 Md. Ch. 266; *Davis v. Ney*, 125 Mass. 590; *Sheedy v. Roach*, 124 Mass. 472; *Foss v. Lowell Five Cent Savings Bank*, 111 Mass. 285; *Kimball v. Leland*, 110 Mass. 325; *Kingman v. Perkins*, 105 Mass. 111; *Chase v. Redding*, 79 Mass. (13 Gray) 418; *Stone v. Hackett*, 78 Mass. (12 Gray) 227; *Bates v. Kempton*, 73 Mass. (7 Gray) 382; *Sessions v. Moseley*, 58 Mass. (4 Cush.) 87; *Grover v. Grover*, 41 Mass. (24 Pick.) 261; *Reed v.*

In *Ex parte White*, *In re Neville*,⁸ is an interesting exposition, by James and Mellish, L.JJ. of the principles by which

⁸ 6 Ch. 397; s. c. in *H. L.* 21 W. R. 465; and see *Ex parte Bright*, *In re Smith*, 10 Ch. D. 566, C. A.

Spaulding, 42 N. H. 114; *Martin v. Funk*, 75 N. Y. 134; *Curry v. Powers*, 70 N. Y. 212; *Westerlo v. De Witt*, 36 N. Y. 340; *Bedell v. Carll*, 33 N. Y. 581; *Brown v. Brown*, 23 Barb. (N. Y.) 565; *Hunter v. Hunter*, 19 Barb. (N. Y.) 631; *Huntington v. Gilmore*, 14 Barb. (N. Y.) 243; *Vandermark v. Vandermark*, 55 How. (N. Y.) Pr. 408; *In re Ward*, 51 How. (N. Y.) Pr. 316; *Turner v. Brown*, 6 Hun (N. Y.) 331; *Johnson v. Spies*, 5 Hun (N. Y.) 468; *Brink v. Gould*, 7 Lans. (N. Y.) 425; *Whiting v. Barrett*, 7 Lans. (N. Y.) 106; *Coutant v. Schueler*, 1 Paige Ch. (N. Y.) 316; *Stevens v. Stevens*, 2 Redf. (N. Y.) 205; *Basket v. Hassell* (U. S. '83), 27 Alb. L. J. 367; *Lamprey v. Lamprey* (Minn. '82), 26 Id. 397; *Adams v. Hayes*, 2 Ired. (N. C.) L. 366; *Simmons v. Cincinnati Sav. Soc.*, 31 Ohio St. 457; *Phipps v. Hope*, 16 Ohio St. 586; *Withers v. Weaver*, 10 Pa. St. 391; *In re Campbell's Estate*, 7 Pa. St. 100; *Tillinghast v. Wheaton*, 8 R. I. 536; *Blanchard v. Sheldon*, 43 Vt. 518; *Dean v. Dean's Estate*, 43 Vt. 337; *Carpenter v. Dodge*, 20 Vt. 595; *Mahan v. United States*, 83 U. S. (16 Wall.) 143; bk. 21, L. ed. 307; *Rupert v. Johnston*, 40 Up. Can. Q. B. 11; *McCabe v. Robertson*, 18 Up. Can. C. P. 471; *Queen v. Carter*, 13 Up. Can. C. P. 611; *Scott v. McAlpine*, 6 Up. Can. C. P. 302; *White v. Atkins*, 5 Low. Can. 420; *Malone v. Reynold*, 2 Fox & Smith, 59. *Young v. Derenzy*, 26 Grant Ch. (Ont.) 509; *Blain v. Terryberry*, 9 Grant Ch. (Ont.) 286; 2 Kent Com. 438, 439.

Unless the article given is already in possession of the donee, in which case delivery is not necessary. *Tenbrook v. Brown*, 17 Ind. 410; *Wing v. Merchant*, 57 Me. 383; *Dole v. Lincoln*, 31 Me. 422; *Champney v. Blan-*

chard, 39 N. Y. 116, 117; *Huntington v. Gilmore*, 14 Barb. (N. Y.) 243 *et seq.*; *Whiting v. Barrett*, 7 Lans. (N. Y.) 106, 109; *Shower v. Pilck*, 4 Ex. 478. But the English cases hold that where the donor intended to pass the property at once, it is at least a declaration of trust, although there is no actual delivery to the donee. See *Morgan v. Malleeson*, L. R. 10 Eq. 475; *Bromley v. Bruntun*, L. R. 6 Eq. 275; *Penfold v. Mould*, L. R. 4 Eq. 562; *Richardson v. Richardson*, L. R. 3 Eq. 686; *Jones v. Lock*, L. R. 1 Ch. 25; *Donaldson v. Donaldson*, Kay, 711; *In re Way's Trusts*, 2 De G. J. & S. 365.

Delivery in each instance must be according to the nature of the thing given. The donor must part with dominion over the property as well as with its possession. After delivery and acceptance, the gift is complete and is irrevocable by the donor. The acceptance of a beneficial gift is presumed by the law. *Stone v. Hackett*, 78 Mass. (12 Gray) 227; *Borneman v. Sidlinger*, 15 Me. 429; *Noble v. Smith*, 2 John. (N. Y.) 52; *Picot v. Sanderson*, 1 Dev. (N. C.) L. 309; *Viet v. Viet*, 34 Up. Can. Q. B. 104; *Kerr v. Read*, 23 Grant Ch. (Ont.) 525; *Tancred v. O'Mullin*, 2 Oldright (N. S.) 145; *Walker v. M'Bride*, 2 Huds. & Br. 215; *Hooper v. Goodwin*, 1 Swanst. 485. An acceptance need not be shown; thus a gift to an infant or a lunatic is valid. *De Levillain v. Evans*, 39 Cal. 120; *Rinker v. Rinker*, 20 Ind. 185. But a mere promise to make a gift, though in writing, is invalid; and a gift of the giver's own note, it being without consideration, is not binding upon him, unless it is in the hands of a *bond fide* purchaser. *Phelps v. Pond*, 23 N. Y. 69, 78; *Starr v. Starr*, 9 Ohio St. 74; *Walsh v. Kennedy*, 9 Phila. (Pa.) 178.

to distinguish between a contract of "sale or return" and a contract of del credere agency; and in the *South Australian Insurance Company v. Randell*,⁹ the distinction between a sale and a bailment is elucidated.¹⁰

§ 3. By the common law, all that was required to give validity to a sale of personal property, whatever may have been the amount or value, was the mutual assent of the

When money or property is delivered to an attorney or a trustee for the benefit of a third person or for a charitable purpose, it may be reclaimed by the donor at any time before it reaches the beneficiary. *People v. Johnson*, 14 Ill. 342; *Picot v. Sanderson*, 1 Dev. (N. C.) L. 309; 2 Kent Com. 349. However, where the attorney or trustee has, with the consent of the donor, changed his character and become agent or trustee for the donee, the donor cannot recall the gift. *Dresser v. Dresser*, 46 Me. 48; *Blanchard v. Sheldon*, 43 Vt. 512.

Death revokes agency, and there must be an actual transfer or symbolical delivery before that time, and where the attorney or trustee has not made a delivery to the donee or become his agent, on the death of the donor the gift fails. *Sessions v. Moseley*, 58 Mass. (4 Cush.) 87; *Parish v. Stone*, 31 Mass. (14 Pick.) 198; *Phipps v. Hope*, 16 Ohio St. 586; *Helfenstein's Estate*, 77 Pa. St. 328; s. c. 18 Am. Rep. 449; *Traugh's Estate*, 75 Pa. St. 115; *Phipps v. Jones*, 20 Pa. St. 260; s. c. 59 Am. Dec. 708; *Chambers v. Calhoun*, 18 Pa. St. 13; s. c. 55 Am. Dec. 583; *Crawford's Appeal*, 61 Pa. St. 52. The difference between a gift *inter vivos* and *causa mortis* is that the former is irrevocable and complete whether the donor die or not, while the latter is not. *Sessions v. Moseley*, 58 Mass. (4 Cush.) 87; *Grover v. Grover*, 41 Mass. (24 Pick.) 281; s. c. 35 Am. Dec. 319. The Supreme Court of Maine have stated "that gifts *inter vivos* and gifts *causa mortis*

differ in nothing, except that the latter are made in expectancy of death, to take effect only on the death of the donor, and may be revoked; otherwise the same principles apply to each. See *Dresser v. Dresser*, 46 Me. 48, 67. Title to gifts may pass by gift *inter vivos* where there is a delivery of the property with an intention to consummate the gift, but the mere delivery of the property will not in general pass the title; there must be an intention to give accompanying the act of delivery in order to consummate the gift, and the circumstances attending the delivery of the property must be such as ordinarily accompanies a gift, inducing the donee to believe that the gift was intended, in which case the gift will be perfect, although it may not be a secret intention of the donor to make a gift. See *Carter v. Rutland*, 1 Hayw. (N. C.) 97; *Farrell v. Perry*, 1 Hayw. (N. C.) 2; *Hallowell v. Skinner*, 4 Ired. (N. C.) 165; *Ford v. Aiken*, 4 Rich. (S. C.) 133; *contra*, *Keeney v. Macey*, 4 Bibb (Ky.) 35; *Smith v. Montgomery*, 5 Met. (Ky.) 504; *Betts v. Francis*, 30 N. J. L. (1 Vr.) 152. Where a particular chattel forms the bulk of the estate, the gift as a *donatio mortis causa* will be valid (*Mitchener v. Dale*, 23 Pa. St. 59); but otherwise such a gift of one's property will not be valid; although accompanied by delivery the gift cannot take the place of a will. *Headley v. Kirby*, 18 Pa. St. 326.

⁹ L. R. 3 P. C. C. 101.

¹⁰ See *ante*, § 1, note 2.

parties to the contract. As soon as it was shown by any evidence, verbal or written, that it was agreed by mutual assent that the one should transfer the absolute property in the thing to the other for *a money price, [*4] the contract was completely proven, and binding on both parties.¹ If, by the terms of the agreement, the property in the thing sold passed immediately to the buyer, the contract was termed in the common law "a bargain and sale of goods;" but if the property in the goods was to remain for the time being in the seller, and only to pass to the buyer at a future time, or on the accomplishment of certain conditions, as, for example, if it were necessary to weigh or measure what was sold out of the bulk belonging to the vendor, then the contract was called in the common law an executory agreement. The distinction between a bargain and sale of goods and an executory agreement is the subject of Book II. of this Treatise.

§ 4. A very important modification of the common law in respect to a bargain and sale of goods, and to an executory contract, was introduced by the statute 29 Car. II. c. 3, commonly called the Statute of Frauds, and an amendment thereof, the 9 Geo. IV. c. 14, s. 7, known as "Lord Tenterden's Act," which are very fully considered, *post*, Book I. Part II.

¹ See *Darden v. Lovelace*, 52 Ala. 74, 77; *Audenrerd v. Randall*, 3 Cliff. 290, 291; *Lincoln v. Johnson*, 43 Vt. C. C. 99.

[*5]

*CHAPTER II.

OF THE PARTIES TO THE CONTRACT.

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§ 5. So far as the general capacity to contract is concerned, and the rules of law relating to persons either totally incompetent to contract, or protected from liability by reason of infancy, coverture, and the like causes, the reader must be referred to treatises which embrace the subject of contracts in general. Such rules and principles as are specially applicable to sales of goods will be examined in this chapter.

Section I. — WHO MAY SELL.

§ 6. In general, no man can sell goods and convey a valid title to them unless he be the owner,¹ or lawfully² represent

¹ See *Klein v. Seibold*, 89 Ill. 540, 542; *Breckenridge v. McAfee*, 54 Ind. 141; *Bearce v. Bowker*, 115 Mass. 129, 132.

Sale by the owner. — It was formerly held that the owner could not make a valid sale of property in the adverse possession of another, because the claim was regarded as a chose in action, and for that reason not assignable. See *Dunklin v. Wilkins*, 5 Ala. 199; *O'Keefe v. Kellog*, 15 Ill. 347; *McGoon v. Ankeny*, 11 Ill. 558; *Young v. Ferguson*, 1 Litt. (Ky.) 298; *Stogdell v. Fugate*, 2 A. K. Marsh. (Ky.) 136; *Gardner v. Adams*, 12 Wend. (N. Y.) 297; *Overton v. Williston*, 31 Pa. St. 160. But the prevailing doctrine in this country now is that a valid sale of personal property may be made by the owner, although the property is at the time in the adverse possession of another (*Storey v. Agnew*, 2 Ill. App. 353; *Cartland v. Morrison*, 32 Me. 190; *Webber v. Davis*, 44 Me. 147; s. c. 49 Am. Dec. 87; *Carpenter v. Hale*, 74 Mass. (8 Gray) 157; *Cravath v. Plympton*, 13 Mass. 454; *Ball v. Loomis*, 29 N. Y. 412; *McKee v. Judd*, 12 N. Y. 622; s. c. 64 Am. Dec. 515; *Hall v. Robinson*, 2 N. Y. 293; [criticising *Gardner v. Adams*, 12 Wend. (N. Y.) 297;] *Van Hassell v. Borden*, 1 Hilt. (N. Y.) 128; *Mumper v. Rushmore*, 14 Hun (N. Y.) 591; *People v. Tiogo Common Pleas*, 19 Wend. (N. Y.) 73; *Tome v. Dubois*, 73 U. S. (6 Wall.) 548, 554; bk. 18, L. ed. 943; *Hambly v. Trott*, Cowper, 372; 2 *Greenleaf's Evidence*, 108); as in case of a sale on a condition which has been broken (*Hubbard v. Bliss*, 94 Mass. (12 Allen) 590); where the property has been pledged for a loan (*Hall v. Robinson*, 2 N. Y. 293); where in the custody of the sheriff on levy of an

execution or an attachment (*Coghill v. Boring*, 15 Cal. 213; *First National Bank v. Thomas*, 125 Mass. 278; *Appleton v. Bancroft*, 51 Mass. (10 Metc.) 231; *Arnold v. Brown*, 41 Mass. (24 Pick.) 89; *Whitaker v. Sumner*, 37 Mass. (20 Pick.) 399; *Fettyplace v. Dutch*, 30 Mass. (13 Pick.) 388; s. c. 23 Am. Dec. 688; *Denny v. Willard*, 28 Mass. (11 Pick.) 519; s. c. 22 Am. Dec. 389; *Tuxworth v. Moore*, 26 Mass. (9 Pick.) 347; s. c. 20 Am. Dec. 479; *Crofoot v. Bennett*, 2 N. Y. 258; *Klinck v. Kelly*, 63 Barb. (N. Y.) 622; *Olyphant v. Baker*, 5 Den. (N. Y.) 379; *Mumper v. Rushmore*, 14 Hun (N. Y.) 591; *Hooker v. Jarvis*, 6 Up. Can. Q. B. (O. S.) 489); or in possession of the landlord on distress for rent; (*Cooke v. Woodrow*, 1 Cr. C. C. 437); for it is not essential to the ownership of personal property and the consequent right of its disposition, that there should be manual possession at the time of the sale. *Cunningham v. Ashbrook*, 20 Mo. 556; *Nance v. Metcalf*, 19 Mo. App. 183; s. c. 1 West. Rep. 441. In the case of *The Brig Sarah Ann*, 2 Sumn. C. C. 211, Judge Story says: "I know of no principle of law that establishes that a sale of personal goods is invalid, because they are not in the possession of the rightful owner; but are withheld by a wrong-doer. The sale is not, under such circumstances, the sale of a right of action, but it is the sale of the thing itself, and good to pass the title against every person not holding the same under a *bonâ fide* title for a valuable consideration without notice; and *a fortiori*, against a wrong-doer." See, also, *Webber v. Davis*, 44 Me. 147; s. c. 49 Am. Dec. 87; *Cartland v. Morrison*, 32 Me. 130; *First National Bank of*

Cairo v. Crocker, 111 Mass. 163, 169, 170; Hubbard v. Bliss, 94 Mass. (12 Allen) 590; Carpenter v. Hale, 74 Mass. (8 Gray) 157; Boynton v. Willard, 27 Mass. (10 Pick.) 166, 169; Hassell v. Borden, 1 Hilt. (N. Y.) 128; Zabriskie v. Smith, 13 N. Y. 322; Tome v. Dubois, 73 U. S. (6 Wall.) 554; bk. 18, L. ed. 946. And the owner may afterwards maintain an action for damages for the tort, although he has sold the chattel. Clark v. Wilson, 103 Mass. 219; s. c. 4 Am. Rep. 532. As to the sale and delivery of property under attachment, see *post*, § 688, note (b); Hooker v. Jarvis, 6 Up. Can. Q. B. (O. S.) 439; Storey v. Agnew, 2 Ill. App. 353.

The owner of mortgaged goods may sell the same, subject to the lien of the mortgagee. But if the property mortgaged is afterwards sold to a bonâ fide purchaser, on the foreclosure of the mortgage such purchaser will acquire a right superior to, and be protected against the claim of, a bonâ fide purchaser from the mortgagor. See Parr v. Brady, 37 N. J. L. (8 Vr.) 201; Runyon v. Groshon, 12 N. J. Eq. (1 Beas.) 86. It is a general principle that where the same thing is sold by two different persons, by contracts equally valid, and the second vendee is without notice of the sale, he who first obtains possession is entitled to the property. Jewett v. Lincoln, 14 Me. 116; Veazie v. Somerby, 87 Mass. (5 Allen) 280; Packard v. Wood, 70 Mass. (4 Gray) 307; Parsons v. Dickinson, 28 Mass. (11 Pick.) 352; Lanfear v. Sumner, 17 Mass. 110; s. c. 9 Am. Dec. 119; Winslow v. Leonard, 24 Pa. St. 14; Shaw v. Levy, 17 Serg. & R. (Pa.) 99; Fletcher v. Howard, 2 Aik. (Vt.) 115; s. c. 16 Am. Dec. 686. See, also, Brown v. Pierce, 97 Mass. 48; Pratt v. Parkham, 41 Mass. (24 Pick.) 47; Bix v. Franklin Ins. Co., 25 Mass. (8 Pick.) 89; Lamb v. Durrant, 12 Mass. 54; s. c. 7 Am. Dec. 31; Badlam v. Tucker, 18 Mass. (1 Pick.) 396.

The Supreme Court of Massachusetts say in Brown v. Pierce, 97 Mass. 48, that "as between two *bonâ fide* purchasers of the same chattels, he who first obtains delivery and possession of them has the better title against the other, notwithstanding the contract of sale of the latter with the vendor may have been prior in point of time to that of the former. This principle was recognized and adopted by this court on full consideration in Lanfear v. Sumner, 17 Mass. 110, and has been often affirmed by subsequent decisions." The same court say in the more recent case of Thorndike v. Bath, 114 Mass. 118, that in order that a sale of personal property should go into full effect, so that it cannot be defeated or set aside in favor of a subsequent *bonâ fide* purchaser, it is necessary that the first purchaser should show that he had perfected his title by having had actual delivery of it to himself, or by something equivalent thereto. Veazie v. Somerby, 87 Mass. (5 Allen) 280; Packard v. Wood, 70 Mass. (4 Gray) 307; Parsons v. Dickinson, 28 Mass. (11 Pick.) 352; Lanfear v. Sumner, 17 Mass. 110. In a case where there was nothing in the circumstances or nature of the property to prevent a delivery of the thing sold by the vendor to the vendee, it was held that something further than acts and declarations was necessary to be shown to vest the title as against subsequent *bonâ fide* purchasers; and that in such case it would be necessary for the party to show that he had perfected his title by having an actual delivery to him, or what was equivalent thereto. Veazie v. Somerby, 87 Mass. (5 Allen) 280; Packard v. Wood, 70 Mass. (4 Gray) 307; Parsons v. Dickinson, 28 Mass. (11 Pick.) 352; Lanfear v. Sumner, 17 Mass. 110. The court say in Lanfear v. Sumner, 17 Mass. 110, that the general rule is perfectly well established that the delivery of the possession is necessary in a conveyance

of personal chattels, as against every one but the vendor. That where the same goods are sold to two different persons, by conveyance equally valid, he who first lawfully acquires the possession will hold them as against the other. This principle is recognized in *Lamb v. Durant*, 12 Mass. 54, and in *Caldwell v. Ball*, 1 Danf. & E. 205. This was also the rule in civil law, where the same thing was sold to two different persons. "*Manifesti juris est, cum, cui priori traditum est, in detinendo dominio esse potiozem.*" Cod. 3. 32. 15. So Voet ad Paud. lib. 6, tit. 1, § 20, "*Ad vindicationem rei duobus separatin diverso tempore distractae, non is cui priori vendita, sed cui (pretio soluto, vel fide de eo habita) prius est tradita, admittendus est.*" However the common law and the civil law differ in this regard, that by the civil law, delivery, preceded by a contract of sale, is essential to transfer the right in the thing and perfect the title; but by the common law the title is perfected by the contract of sale and payment of the price without any delivery. See *Parsons v. Dickinson*, 23 Mass. (11 Pick.) 354; *Tarling v. Baxter*, 6 B. & C. 360; *Brown on Sales*, 9, 10, 11, 393; *Comyn Contr.* (2d ed.) 298. Since the Statute of Frauds was enacted, the title to an article sold was perfected in cases within the statute by the contract of sale and the payment of the price or the delivery of the bill of sale without any actual delivery of the goods.

Sale by purchaser.—One holding property under an agreement to purchase has an interest in it which he may sell; and if the conditions of his purchase are performed, the title of his vendee will be complete. *McRae v. Merrifield*, 48 Ark. 160. And a conditional sale of a retail stock of goods, with an unlimited power in the vendee to resell, enables the latter to give to a *bonâ fide* sub-vendee a good title as against the original vendor. *Wilder v. Wilson*, 16 Tenn. 548. Thus where a wholesale firm sold

a retail stock of drugs and fixtures to a purchaser partly for cash and partly on time, reserving the title until the price was fully paid, but with power in the vendee to resell and control the proceeds, and without any understanding as to whether the vendee should sell at wholesale or retail, although the parties may have contemplated that the goods would be retailed; the vendee proceeded to dispose of the drugs by retail, adding to his stock from time to time, until only a small remnant of the original purchase remained, when he sold this remnant, together with the fixtures and new stock, to a *bonâ fide* purchaser. Held, that the latter acquired a good title as against the original vendor. *Wilder v. Wilson*, 16 Tenn. 548.

Where a manufacturer and wholesale vendor of personal property sells upon credit and delivers a lot of such articles to a retail dealer, for the apparent or implied purpose of resale by such vendee, an express condition in the sale that the wholesale vendor shall retain the title to the goods until they are paid for, cannot be set up to defeat the title of a purchaser from the vendee. *Winchester Wagon Works & Mfg. Co. v. Carman*, 109 Ind. 31; s. c. 7 West. Rep. 241. It was held in this case that it was proper to admit the statement of the general manager of the manufacturer, while testifying as a witness for the defendant, "that it was the expectation of plaintiff and its agents that said vendee would sell said wagons immediately to the general public, without waiting for the maturity of the notes given therefor, and as fast as opportunity offered." *Winchester Wagon Works & Mfg. Co. v. Carman*, 109 Ind. 301; s. c. 7 West. Rep. 241.

Same: Proposal to modify.—The purchaser having sold a portion of the goods, of which he notified the vendor, offering to pay for the portion sold, and to hold the balance subject to the vendor's order; this

the owner. *Nemo dat quod non habet*.³ A person
 [*6] *therefore, however innocent, who buys goods from
 one not the owner, obtains no property in them what-
 ever^{3a} (except in some special cases presently to be noticed):
 and even if, in ignorance of the fact that the goods were lost
 or stolen, he resell them to a third person in good faith, he
 remains liable in trover to the original owner, who may
 maintain his action without prosecuting the felon.⁴ But a

proposal, being made before the day
 specified in the original contract, and
 not being accepted by the vendor,
 does not change the contract, nor
 affect the purchaser's right to sell
 the residue of the goods to a pur-
 chaser for value. *Robinson v. Fair-*
banks, 81 Ala. 128.

Wrongful possession.—One cannot
 sell goods of which his possession is
 wrongful. *Creighton v. Sanders*, 89
 Ill. 543; *Fawcett v. Osborn*, 32 Ill.
 411; *Prime v. Cobb*, 63 Me. 200;
Moody v. Blake, 117 Mass. 23; s. c.
 19 Am. Rep. 394; *Bearce v. Bowker*,
 115 Mass. 129; *Koch v. Branch*, 44
 Mo. 542; *Ruckman v. Decker*, 23
 N. J. Eq. (8 C. E. Gr.) 283; *Pease v.*
Smith, 61 N. Y. 477; *McGoldrick v.*
Willitts, 52 N. Y. 612; *Wooster v.*
Sherwood, 25 N. Y. 278, 286; *Brower*
v. Peabody, 13 N. Y. 121; s. c. 11
 How. (N. Y.) Pr. 492; *Hoffman v.*
Carow, 22 Wend. (N. Y.) 285, 290;
Saltus v. Everett, 20 Wend. (N. Y.)
 267; s. c. 32 Am. Dec. 541; *Ventress*
v. Smith, 35 U. S. (10 Pet.) 161; bk.
 9, L. ed. 382; *The Fanny*, 22 U. S.
 (9 Wheat.) 658; bk. 6, L. ed. 184.

³ *Klein v. Seibald*, 89 Ill. 540; *Prime*
v. Cobb, 63 Me. 200; *Galvin v. Bacon*,
 11 Me. (2 Fairf.) 28; s. c. 25 Am.
 Dec. 258; *Parsons v. Webb*, 8 Me.
 (8 Greenl.) 38; s. c. 22 Am. Dec. 220;
Moody v. Blake, 117 Mass. 23, 26;
Bearce v. Bowker, 115 Mass. 129;
Kinder v. Shaw, 2 Mass. 398; *Gil-*
more v. Newton, 91 Mass. (9 Allen)
 171; *Riley v. Water Power Co.*, 65
 Mass. (11 Cush.) 11; *Stanley v. Gay-*
lord, 55 Mass. (1 Cush.) 526, 545;

s. c. 48 Am. Dec. 643; *Chapman v.*
Cole, 78 Mass. (12 Gray) 141; s. c.
 71 Am. Dec. 735; *Wilson v. Crockett*,
 43 Mo. 218; *Bryant v. Witcher*, 52
 N. H. 158, 161; *Barrett v. Warren*, 3
 Hill. (N. Y.) 348; *Williams v. Merle*,
 11 Wend. (N. Y.) 80; s. c. 25 Am.
 Dec. 604; *Courtis v. Cane*, 32 Vt. 232;
Riford v. Montgomery, 7 Vt. 418;
Peer v. Humphrey, 2 Ad. & E. 495;
Whetler v. Foster, 32 L. J. C. P. 161.

Sale by tenant in common.—A ten-
 ant in common of real estate may sell
 the entire crop and enforce perform-
 ance. It will be no ground of defence
 that the co-tenant has forbidden pay-
 ment to the seller. *Brown v. Well-*
ington, 106 Mass. 318; s. c. 8 Am.
 Rep. 330. The court say: "The cut-
 ting of the grass by the plaintiff's
 authority and the sale and delivery
 of it by him to the defendant, was an
 appropriation of it, which gave the
 plaintiff a good title to the same, so far
 as the defendant was concerned; and
 that it is no defence to the action,
 that the co-tenant, after it was cut and
 removed, forbade the defendant to
 pay for it. *Peck v. Carpenter*, 73
 Mass. (7 Gray) 283; s. c. 66 Am. Dec.
 477; *Calhoun v. Curtis*, 45 Mass. (4
 Metc.) 413; s. c. 38 Am. Dec. 380.

^{3a} *Sale of stolen goods*.—The owner
 of stolen goods can recover their value
 from a person who has received them,
 notwithstanding such person has been
 acquitted of the criminal charge of
 having received such goods knowing
 them to have been stolen. *Rohm v.*
Borland, (Pa.) 5 Cent. Rep. 562.

⁴ *Stone v. Marsh*, 6 B. & C. 561;

Marsh v. Keating, 1 Bing. N. C. 198; s. c. 2 Cl. & Fin. 250; *White v. Spettigue*, 13 M. & W. 603; *Lee v. Bayes*, 18 C. B. 599.

American authorities.—*Beazley v. Mitchell*, 9 Ala. 780; *Breckenridge v. McAfee*, 54 Ind. 141; *McGrew v. Browder*, 14 Martin (La.) 17; *Browning v. Magill*, 2 Har. & J. (Md.) 308; *Heckle v. Lurvey*, 101 Mass. 344; s. c. 3 Am. Rep. 366; *Dame v. Baldwin*, 8 Mass. 519; *Gilmore v. Newton*, 91 Mass. (9 Allen) 171; *Riley v. Boston Water Power Co.*, 65 Mass. (11 Cush.) 11; *Stanley v. Gaylord*, 55 Mass. (1 Cush.) 536; s. c. 48 Am. Dec. 643; *Chapman v. Cole*, 78 Mass. (12 Gray) 141; s. c. 71 Am. Dec. 739; *Pease v. Smith*, 61 N. Y. 477; *Hoffman v. Carew*, 20 Wend. (N. Y.) 21; s. c. 22 Wend. (N. Y.) 285; *Williams v. Merle*, 11 Wend. (N. Y.) 80; s. c. 25 Am. Dec. 604; *Roland v. Gundy*, 5 Ohio, 202; *Vermilye v. Adams Express Co.*, 88 U. S. (21 Wall.) 138; bk. 22, L. ed. 609; *Ventress v. Smith*, 35 U. S. (10 Pet.) 161; bk. 9, L. ed. 382; *Crane v. London Dock Co.*, 5 Best & S. 313; *Stone v. Marsh*, 6 Barn. & Cres. 551; *Marsh v. Keating*, 1 Bing. N. C. 198; s. c. 2 Cl. & Fin. 250; *White v. Spettigue*, 13 Mees. & W. 603; *Lee v. Bayes*, 18 C. B. 599; *Cooper v. Willo-matt*, 1 C. B. 672; *Loeschman v. Machin*, 2 Stark. 311.

Liability to owner.—A thief acquires no title, and can convey none. *Breckenridge v. McAfee*, 54 Ind. 141; *Robinson v. Skipworth*, 23 Ind. 311; *Galvin v. Bacon*, 11 Me. (2 Fairf.) 28; s. c. 25 Am. Dec. 258; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; *Andrew v. Dieterich*, 14 Wend. (N. Y.) 34; *Williams v. Merle*, 11 Wend. (N. Y.) 30; s. c. 25 Am. Dec. 604. See, also, *Cundy v. Lindsay*, L. R. 3 App. Cas. 459, 468; s. c. 24 Eng. Rep. 345. No sale, or any number of sales, will affect the title of the true owner (*Parham v. Riley*, 4 Coldw. (Tenn.) 9), however removed the buyer will be liable to the true

owner (*Breckenridge v. McAfee*, 54 Ind. 141; *Cumberledge v. Cole*, 44 Iowa, 181; 2 Schouler on Pers. Prop. sec. 18; 15 Am. Law Reg. 363, 366). Each purchase is a conversion where the property is withheld after demand, or dominion exercises over it (*Gilmore v. Newton*, 91 Mass. (9 Allen) 171; *Barrett v. Warren*, 3 Hill (N. Y.) 348), and if the purchaser has resold the property he is liable in an action for the value. *Sharp v. Parks*, 48 Ill. 511; *Hoffman v. Carow*, 20 Wend. (N. Y.) 21; s. c. 22 Wend. (N. Y.) 285; *Horwood v. Smith*, 2 T. R. 751. But a chattel delivered by the owner to a bailee, with the right to purchase, and sold to a *bonâ fide* purchaser, who resold before any demand, without notice of the condition, he is not liable. See *Spooner v. Holmes*, 102 Mass. 503; s. c. 3 Am. Rep. 492; *Day v. Bassett*, 102 Mass. 445; *Vincent v. Cornell*, 30 Mass. (13 Pick.) 295; s. c. 23 Am. Dec. 683. It matters not if the purchase was made in good faith for full value. *Barstow v. Savage Mining Co.*, 64 Cal. 388; s. c. 49 Am. Rep. 705; *Robinson v. Skipworth*, 23 Ind. 311; *Covill v. Hill*, 4 Den. (N. Y.) 323; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; *Lee v. Bayes*, 18 C. B. 599; 2 Schouler on Pers. Prop. sec. 18). As to *bonâ fide* purchasers of stolen certificates of stock, see *Sherwood v. Meadow V. M. Co.*, 50 Cal. 412; *Barstow v. Savage Mining Co.*, 64 Cal. 388; *Mechanics Bank v. New York & N. H. R. R. Co.*, 13 N. Y. 627. One who assists a tortious possessor in effecting a sale of chattels will be liable to the true owner. *Lee v. Matthews*, 10 Ala. 687; s. c. 44 Am. Dec. 498; *Sharp v. Parks*, 48 Ill. 511; *Knapp v. Hobbs*, 50 N. H. 476; *Cobb v. Dows*, 10 N. Y. 335; *Dudley v. Hawley*, 40 Barb. (N. Y.) 405; *Covill v. Hill*, 4 Den. (N. Y.) 323; *Thorp v. Burling*, 11 Johns. (N. Y.) 285; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; s. c. 20

Wend. (N. Y.) 21; *Saltus v. Everett*, 20 Wend. (N. Y.) 267; s. c. 32 Am. Dec. 541; *Williams v. Merle*, 11 Wend. (N. Y.) 80; s. c. 25 Am. Dec. 604; *Everett v. Coffin*, 6 Wend. (N. Y.) 603; s. c. 22 Am. Dec. 551; *Stephens v. Elwall*, 4 Maule & S. 259; *Parker v. Gidin*, 2 Strange, 813; *Perkins v. Smith*, 1 Wils. 328. Thus a stockman who assisted in selling a mortgaged ox (*Knapp v. Hobbs*, 50 N. H. 476); a jeweller, who, as agent, sold a set of stolen diamonds (*Dudley v. Hawley*, 40 Barb. (N. Y.) 397); a merchant, who received wheat from a storehouse, delivered from the wrong bin (*Cobb v. Dows*, 10 N. Y. 335); and an auctioneer, have all been held to be responsible to the rightful owner. *Coles v. Clark*, 57 Mass. (3 Cush.) 399; *Brackett v. Bullard*, 53 Mass. (12 Metc.) 308; *Knapp v. Hobbs*, 50 N. H. 476; *White v. Phelps*, 12 N. H. 382; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; s. c. 20 Wend. (N. Y.) 21; *Farebrother v. Ansley*, 1 Campb. 343; *Adamson v. Jarvis*, 4 Bing. 66; *Story on Agency*, sec. 312. But no liability attaches to one who simply receives stolen goods wrongfully delivered to him by the person in possession (*Pierce v. Van Dyke*, 6 Hill (N. Y.) 614; *Barrett v. Warren*, 3 Hill (N. Y.) 350; *Storm v. Livingston*, 6 Johns. (N. Y.) 44; *Nash v. Mosher*, 19 Wend. (N. Y.) 431; *Marshall v. Davis*, 1 Wend. (N. Y.) 111; s. c. 19 Am. Dec. 463), or to a depository, who in good faith returns the goods to the depositor, (*Hill v. Hayes*, 38 Conn. 532; *Loring v. Mulcahy*, 85 Mass. (3 Allen) 575; *Dudley v. Hawley*, 40 Barb. (N. Y.) 397); and a broker or other person, who sells negotiable securities for a thief, incurs no liability. *Spooner v. Holmes*, 102 Mass. 503; s. c. 3 Am. Rep. 491; *Parker v. Lombard*, 100 Mass. 405; *Commonwealth v. Emigrant Industrial Savings Bank*, 98 Mass. 12; *Loring v. Mulcahy*, 85 Mass. (3 Allen)

575; *Robinson v. Austin*, 68 Mass. (2 Gray) 564; *Heald v. Carey*, 11 C. B. 977; *Wookey v. Pole*, 4 Barn. & Ald. 1; *Gorgier v. Mievill*, 4 D. & R. 641; s. c. 3 Barn. & Cres. 45; *Fouldes v. Willoughby*, 8 Mees. & W. 540. And some cases hold that an auctioneer, who receives stolen goods and sells in good faith, is not liable. *Hill v. Hays*, 38 Conn. 532; *Sharp v. Parks*, 48 Ill. 511; *Alexander v. Swackhamer*, 105 Ind. 81; s. c. 55 Am. Rep. 180, 185; *Hills v. Snell*, 104 Mass. 171, 173; s. c. 6 Am. Rep. 216; *Gilmore v. Newton*, 91 Mass. (9 Allen) 171; *Loring v. Mulcahy*, 85 Mass. (3 Allen) 575; *Coles v. Clark*, 57 Mass. (3 Cush.) 399; *Knapp v. Hobbs*, 50 N. H. 476; *Pease v. Smith*, 61 N. Y. 477; *Cobb v. Dows*, 10 N. Y. 335; *Dudley v. Hawley*, 40 Barb. (N. Y.) 397; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; s. c. 20 Wend. (N. Y.) 21; *Williams v. Merle*, 11 Wend. (N. Y.) 80; s. c. 25 Am. Dec. 604; *Schouler Pers. Prop.* § 19; *Story on Agency*, § 312. And the same is true of a broker who sells on commission stolen stock, brought to him by a stranger. *Bercich v. Marye*, 9 Nev. 312. It makes no difference that the bailee of stolen goods sells them in good faith. *Koch v. Branch*, 44 Mo. 544; *Kramer v. Faulkner*, 9 Mo. App. 34. A mere naked bailee, who has received stolen goods, delivers them to the person from whom he received them; he is not liable, although he knew that they were stolen and from whom. *Hills v. Hays*, 38 Conn. 532; *Hills v. Snell*, 104 Mass. 177; s. c. 6 Am. Rep. 216; *Gilmore v. Newton*, 91 Mass. (9 Allen) 171; *Loring v. Mulcahy*, 85 Mass. (3 Allen) 575; *Coles v. Clark*, 57 Mass. (3 Cush.) 399; *Pease v. Smith*, 61 N. Y. 477; *Dudley v. Hawley*, 40 Barb. (N. Y.) 397; *Williams v. Merle*, 11 Wend. (N. Y.) 80; s. c. 25 Am. Dec. 604; *Curtis v. Cane*, 32 Vt. 232.

man may make a valid *agreement to sell* a thing not yet his,⁵ and even a thing not yet in existence; this *executory* contract will be examined in the next chapter, which treats of the things sold.

§ 7. In general, also, any person competent to contract may sell goods of which he is owner, and convey a perfect title to the purchaser. But if the buyer has notice that any writ, by virtue of which the goods of the vendor might be seized or attached, has been delivered to and remains unexecuted in the hands of the sheriff, under-sheriff, or coroner, the goods purchased by him are liable to seizure in his hands, under such writ, by virtue of the statutes 29 Car. II. c. 3, and 19 & 20 Vict. c. 97, s. 1. The delivery of the writ to the sheriff binds the property from the date of delivery, but does not change the ownership; so that the vendor's transfer is valid, but the purchaser takes the goods subject to the rights of the execution creditor.¹ If, however, the purchaser had no notice of the existence of the writ in the sheriff's hands, the first section of the Act 19 & 20 Vict. c. 97, called the "Mercantile Law Amendment Act," protects him,² by

⁵ See *Bruce v. Bishop*, 34 Vt. 161, 163.

¹ *Woodland v. Fuller*, 11 Ad. & E. 859; see *infra*, § 927.

² *Sale of property by conditional vendee*. — It was held, by the Supreme Court of Vermont, in a recent case that where a person without notice purchases personal property, on which there is a valid recorded lien of a conditional vendee, and sells it, that he is liable in an action of trover. *Church's Adm'r v. McLeod*, 58 Vt. 541; s. c. 2 New Eng. Rep. 190. The reason for this is that where property is sold and the title therefore is to remain in the vendor until the purchase price has been paid, the conditional purchaser acquires no title to the property and can convey none. The recording of the contract, agreeably to the requirements of the statute, is constructive notice to all the world of its terms. Any one who

purchases the property, in legal contemplation purchases, knowing that the property belongs to another, and by reselling so far assumes the possession or the control over it, wrongfully, as to render himself liable for the conversion in an action of trover; for one who has not performed a condition precedent to the accrual of his title to personal property, having no title, can convey none even to a purchaser without notice. *Leath v. Uttley*, 66 Tex. 82.

It is a well-established doctrine in Indiana and other states that where the owner of personal property sells and delivers it to a purchaser, not for the purpose of consumption or resale, at a price payable at a future day, upon express condition that the title shall remain in the vendor until the price is fully paid, the vendee can neither sell nor incumber the property in any way to defeat the

providing that no such writ "shall prejudice the title to such goods acquired by any person *bonâ fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ."³

[*7] § 8. * The first and most important exception to the rule that a man cannot make a valid sale of goods that do not belong to him, is presented in the case of sales made in *market overt*.¹

title of the vendor. *Winchester Wagon Works & Mfg. Co. v. Carman*, 109 Ind. 31; s. c. 7 West. Rep. 241, 242; *Baals v. Stewart*, 109 Ind. 371; s. c. 7 West. Rep. 61; *Lauman v. McGregor*, 94 Ind. 301; *Payne v. June*, 92 Ind. 252; *Domestic Sewing Machine Co. v. Arthurltz*, 63 Ind. 322; *McGirr v. Sell*, 60 Ind. 249; *Bradshaw v. Warner*, 54 Ind. 58; *Thomas v. Winters*, 12 Ind. 322. And the Supreme Court of the United States held in a recent case that a bailee of personal property on a conditional sale cannot convey the title or subject it to execution for his own debts until the condition of the sale has been performed. *Harkness v. Russell*, 118 U. S. 663; bk. 30, L. ed. 285.

³ This section is not retrospective in its operation, and does not affect pre-existing rights. *Williams v. Smith*, 26 L. J. Ex. 371; 2 H. & N. 443, and in error, 28 L. J. Ex. 286; 4 H. & N. 559; *Flood v. Patterson*, 30 L. J. Ch. 486; and *Jackson v. Woolley*, 8 E. & B. 778; 27 L. J. Q. B. 181, 448. The subsequent statutes of 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112, furnish the rules on this subject, in respect of land, including leasehold titles to land.

¹ *Definition of the market overt*.—It has been said that by "market overt" is meant an open, public, and legally constituted market (*Lee v. Bayes*, 18 C. B. 599), and comprises those open markets or fairs where the owner is supposed to have the amplest opportunity to make pursuit of

his property, and prevent its sale. *Williams v. Merle*, 11 Wend. (N. Y.) 80; s. c. 25 Am. Dec. 604; *Crane v. London Dock Co.*, 33 L. J. Q. B. 224; "Conversion by Purchase," 15 Am. L. Rev. 363, 368.

The sale must be openly made (*Clifton v. Chancellor*, Moore, 624); hence where a sale is made in the inner room or behind a counter, where some of the shop windows are shut, or after sunset, it is not a sale in market overt. *L'Evesquet de Worcester's Case*, Moore, 360; s. c. Popham, 84; 2 Inst. 714. It is questioned in *Crane v. London Dock Co.*, 5 Best. & S. 313; s. c. 33 L. J. Q. B. 224, whether a sale made to a shop-keeper of goods usually kept by him is a sale in market overt; however, in *Lyons v. De Pass*, 11 Ad. & El. 326, a sale to a shop-keeper was held to be within the rule although the point was not directly raised in the case.

The doctrine in England.—It is said that the doctrine respecting market overt is of Saxon origin (see *Bryant v. Whitcher*, 52 N. H. 158; 2 Kent Com. 324, note a), and was adopted at a time when theft, plunder, and sale were among the principal modes of transferring property, and by providing special protection for purchases made at sales in open public markets was designed to prevent private sales. *Bryant v. Whitcher*, 52 N. H. 158. In *Crane v. London Dock Co.*, 5 Best. & S. 313; s. c. 33 L. J. Q. B. 224, Lord Cockburn

says that the practice of selling at market overt "arose at a time when there was much greater simplicity of practice between buyer and seller. The practice was then to buy in markets and fairs. Shops were very few in London, and persons whose goods were taken feloniously would know to what place to resort in order to find them. I can therefore quite understand that the law in question was established for the protection of buyers, and if a man did not pursue his goods to market where such goods were openly sold, he ought not to interfere with the right of the honest and *bonâ fide* purchaser." At an early day in England it became the rule that a sale in market overt to a *bonâ fide* purchaser transferred a complete title to the thing sold as against all the world, except in special cases. See *Peer v. Humphrey*, 2 Ad. & El. 495; *Lee v. Bayes*, 18 C. B. 599; *Cundy v. Lindsay*, L. R. 3 App. Cas. 459; s. c. 47 L. J. Q. B. 481; s. c. 38 L. T. 683; 26 W. R. 406; affirming s. c. L. R. 2 Q. B. Div. 96; 13 Cox C. C. 583; 46 L. J. Q. B. 233; 36 L. T. 345; *Case of Market Overt*, 5 Co. 83 b; 35 W. R. 417; 2 Black. Com. 449; 2 Kent Com. 323; 2 Inst. 220, 713; Comyn Dig. tit. Market, E.

The doctrine in Ontario.—It is questioned whether the doctrine of sale in market overt has ever been adopted in the Province of Ontario. *Bowman v. Yielding*, 1 Rob. & J. Dig. 2226.

The doctrine in America.—The doctrine of market overt has never been adopted in this country. *Fawcett v. Osborn*, 32 Ill. 411; *Robinson v. Skipworth*, 23 Ind. 311; *Alexander v. Gusman*, 16 La. An. 251; *Coombs v. Gorden*, 59 Me. 111, 112; *Browning v. Magill*, 2 Har. & J. (Md.) 308; *Towne v. Collins*, 14 Mass. 500; *Dame v. Baldwin*, 8 Mass. 521; *Depew v. Robards*, 17 Mo. 580; *Bryant v. Whit-cher*, 52 N. H. 158; *Mowrey v. Walsh*, 8 Cow. (N. Y.) 238; *Roberts v. Dillon*,

3 Daly (N. Y.) 50; *Wheelwright v. Depeyster*, 1 Johns. (N. Y.) 480; s. c. 3 Am. Dec. 345; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; s. c. 20 Wend. (N. Y.) 21; *Andrew v. Dieterich*, 14 Wend. (N. Y.) 31; *Roland v. Gundy*, 5 Ohio, 203; *Easton v. Worthington*, 5 Serg. & R. (Pa.) 130; *Hardy v. Metzgar*, 2 Yeates (Pa.) 347; *Hosack v. Weaver*, 1 Yeates (Pa.) 478; *Carmichael v. Buck*, 10 Rich. (S. C.) L. 332; s. c. 72 Am. Dec. 226; *Arendale v. Morgan*, 5 Sneed (Tenn.) 703; *Sanborn v. Kittredge*, 20 Vt. 632; s. c. 50 Am. Dec. 58; *Griffith v. Fowler*, 18 Vt. 390; *Heacock v. Walker*, 1 Tyler (Vt.) 341; *Ventress v. Smith*, 35 U. S. (10 Pet.) 161, 176; bk. 9, L. ed. 386; *Southwick v. Harndell*, 2 Dane Abr. 286; 3 Kent Com. 324; 2 Kent Com. 344; *Hilliard on Sales*, (3d ed.) 45. For this reason a buyer from a thief acquires no title. *Jones v. Nellis*, 41 Ill. 482; *Fawcett v. Osborn*, 32 Ill. 425; *Coombs v. Gorden*, 59 Me. 111; *Browning v. Magill*, 2 Har. & J. (Md.) 308; *Dana v. Baldwin*, 8 Mass. 518; *Bryant v. Whit-cher*, 52 N. H. 158; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285; *Black v. Jones*, 64 N. C. 318; *Roland v. Gundy*, 5 Ohio, 202; *Easton v. Worthington*, 5 Serg. & R. (Pa.) 130; *Dawson v. Susong*, 1 Heisk. (Tenn.) 243; *Ventress v. Smith*, 35 U. S. (10 Pet.) 161, 176; bk. 9, L. ed. 386. And a purchaser at a public, open market gets no better title to the goods sold than if he had bought at a private sale (*Fawcett v. Osborn*, 32 Ill. 411; *Browning v. Magill*, 2 Har. & J. (Md.) 308); and where one in good faith buys an article in a store or shop, he gets no better title than the vendor; and where the latter has no title and no authority from the owner, no title passes. *Roberts v. Dillon*, 3 Daly (N. Y.) 50. It was said in *Heacock v. Walker*, 1 Tyler (Vt.) 341, that probate and execution sales, and sales of estrays and goods found were to be considered sales in market overt; but this case was overruled in *San-*

§ 9. MARKET OVERT in the country is held on special days, provided by charter or prescription;¹ but in London every day except Sunday is market-day.² In the country the only place that is market overt is the particular spot of ground set apart by custom for the sale of particular goods, and this does not include shops; but in London every shop in which goods are exposed publicly for sale is market overt for such goods as the owner openly professes to trade in.³

As a London shop is not a market overt for any goods

born *v.* Kittredge, 20 Vt. 632; s. c. 50 Am. Dec. 58. See Griffith *v.* Fowler, 18 Vt. 390.

In *Ventress v. Smith*, 35 U. S. (10 Pet.) 161, 176; bk. 9, L. ed. 386, the court say: "It is a general rule of law, that a sale by a person who has no right to sell is not valid against the rightful owner. . . . It was a maxim of the civil law, that *nemo plus juris in alium transferre potest, quam ipse habet*; and this is a plain dictate of common sense. It was also a principle of the English common law, that a sale out of market overt did not change the property from the rightful owner; and the custom of the city of London, which forms an exception to the general rule, has always been regarded and restricted by the courts with great care and vigilance, that all such sales should be brought strictly within the custom; Com. Dig. tit. Market, E. It has sometimes been contended, that a *bonâ fide* purchase for a valuable consideration and without notice was equivalent to a purchase in a market overt under the English law, and bound the property against the party who had right. *Wheelwright v. Depeyster*, 1 Johns. (N. Y.) 471, 478; s. c. 3 Am. Dec. 345. But we are not aware that this Saxon institution of markets overt, which controls and interferes with the application of the common law, has ever been recognized in any of the United States, or received any judicial sanction." *Easton v. Worthington*, 5 Serg. & R. (Pa.) 130. The

question was first raised in this country in the case of *Towne v. Collins*, 14 Mass. 500, decided by the Supreme Court of Massachusetts in 1785, which was a case where a thief had sold a pair of oxen to the defendant, and the real owner sustained trover to recover their possession. The same rule has been applied where the sale of stolen goods was made in a market established by law. *Fawcett v. Osborn*, 32 Ill. 425; *Browning v. Magill*, 2 Har. & J. (Md.) 308; *Hinckley v. Merchants' Nat. Bank*, 131 Mass. 149; *Dame v. Baldwin*, 8 Mass. 518; *Mowrey v. Walsh*, 8 Cow. (N. Y.) 238; *Wheelwright v. Depeyster*, 1 Johns. (N. Y.) 471; s. c. 3 Am. Dec. 345; *Hoffman v. Carow*, 20 Wend. (N. Y.) 21; s. c. 22 Wend. (N. Y.) 285; *Roland v. Gundy*, 5 Ohio, 202; *Easton v. Worthington*, 5 Serg. & R. (Pa.) 130; *Hardy v. Metzgar*, 2 Yeates (Pa.) 347; *Hosack v. Weaver*, 1 Yeates (Pa.) 478; *Heacock v. Walker*, 1 Tyler (Vt.) 338; *Ventress v. Smith*, 35 U. S. (10 Pet.) 161, 176; bk. 9, L. ed. 386; *Southwick v. Harndell*, 2 Dane Abr. 286.

¹ See *Benjamin v. Andrews*, 5 C. B. N. S. 299; 27 L. J. M. C. 310.

² Case of market overt, 5 Rep. 83 b; *L'Evesque de Worcester's Case*, Moore, 360; *Popham*, 84; *Comyn Dig. tit. Market, E*; 2 Bl. Com. 449; *Lyons v. De Pass*, 11 Ad. & E. 326; *Crane v. The London Dock Company*, 33 L. J. Q. B. 224; s. c. 5 B. & S. 313; *Anon.* 12 Mod. 521.

³ 5 Rep. 83 b.

except such as are usually sold there,⁴ it was held in the leading case⁸ that a scrivener's shop was not a market overt for plate,⁴ though a goldsmith's would have been. So Smithfield was held not to be a market overt for clothes,⁵ but only for horses and cattle;⁶ and Cheapside not for horses;⁷ and Aldridge's not for carriages.⁸

A wharf is not a market overt, even in the city of London.⁹

In *Crane v. The London Dock Company* in the Queen's Bench, the common law doctrine of market overt was much discussed, and the Chief Justice expressed the opinion that a sale could not be considered as made in market overt "unless the goods were exposed in the market for sale, and the whole transaction begun, continued and completed in the open market; so as to give the fullest opportunity to the man whose goods have been taken to make pursuit of them, and prevent their being sold."¹⁰

§ 10. * [The doctrine of sale in market overt exists [*8] for the protection of *the innocent purchaser*: it was therefore held in a recent Irish case that an *innocent vendor* was not relieved from liability by such a sale, and was responsible in an action of trover by the rightful owner for the value of the goods sold.^{1]}

§ 11. The exceptions to the validity of sales made in *market overt* by one who is not the owner, and the rules of law governing the subject, are fully treated by Lord Coke, in 2 Inst. 713, and have been the subject of numerous decisions. A sale in market overt does not give a good title to goods belonging to the sovereign; nor protect a buyer who knew

⁴ L'Evesque de Worcester's Case, Moore, 360; s. c. Popham, 84; 1 And. 344; 2 Roll. Abr. tit. Market Overt.

⁸ 5 Rep. 83 b.

⁵ Nor a mercer's shop for the sale of cloaks and petticoats. Taylor v. Chambers, Cro. Jac. 68. See authorities in note 4, *supra*.

⁶ Moore, 360.

⁷ *Ib.* See also Taylor v. Chambers, Cro. Jac. 68. See authorities in note 4.

⁸ Warner v. Banks, 17 L. T. N. S. 147; s. c. 16 W. R. 62; Anonymous, 12 Mod. 521; Lee v. Bayes, 18 C. B. 599.

⁹ Wilkinson v. King, 2 Camp. 335.

¹⁰ *Per* Cockburn C. J. in *Crane v. The London Dock Company*, 5 B. & S. 313; 33 L. J. Q. B. 224.

¹ Ganley v. Ledwidge, 10 Ir. R. C. L. 33.

that they were not the property of the seller, or was guilty of bad faith in the transaction. The purchaser is not protected if the sale be made in a covert place, as a back room, warehouse or shop with closed windows; or between sunset and sunrise; or if the treaty for sale be begun out of market overt. The privilege of market overt does not extend to gifts,¹ nor to sales of pawns taken to any pawnbroker in London, or within two miles thereof;² and if the original vendor, who sold without title, come again into possession of the goods after any number of intervening sales, the right of the original owner revives.³

§ 12. A sale by sample is not a sale in market overt, and in *Hill v. Smith*,¹ Sir James Mansfield C. J. said: "All the doctrine of sales in market overt militates against any idea of a sale by sample; for a sale in market overt requires that the commodity should be openly sold and delivered in the market." This decision was approved and followed by the Queen's Bench in *Crane v. The London Dock Company*.²

[*9] * In *Lyons v. De Pass*,³ a sale was held to be entitled to the privilege of market overt where made in a shop in the City of London to the shopkeeper who dealt in such goods: but the point was not raised, and the existence of the privilege in such a case was strongly questioned by the judges in *Crane v. The London Dock Company*.⁴

The security of a purchaser in market overt who innocently buys stolen goods, is affected by the statute 24 & 25 Vict. c. 96, s. 100, which re-enacts and adds to the 7 & 8 Geo. IV. c. 29, s. 57.⁵ By the terms of this section, it is provided

¹ 2 Inst. 713; 2 Bl. Com. 499; *Hartop v. Hoare*, 2 Str. 1187; *Wilkinson v. King*, 2 Camp. 335; *Packer v. Gillies*, 2 Camp. 336, note; cases cited in *Crane v. The London Dock Company*, 33 L. J. Q. B. 224; 5 B. & S. 363.

² 1 Jac. I. c. 21, s. 5; *Hartop v. Hoare*, 3 Atk. 44.

³ 2 Bl. Com. 450; 2 Inst. 713; and see *per Best J.* in *Freeman v. East India Company*, 5 B. & A. 624.

⁴ 4 Taunt. 582.

⁵ 33 L. J. Q. B. 224; 5 B. & S. 313. See *Bailiffs, &c. of Tewkesbury v. Diston*, 6 East, 438; *Newtownards Commissioners v. Woods*, 11 Ir. R. C. L. 506.

⁶ 11 Ad. & E. 326.

⁷ See *Town Commissioners v. Wood*, Ir. R. 11 C. L. 506. *Vide ante*, note 2.

⁸ See also 21 Henry VIII. c. 11, and *Parker v. Patrick*, 5 T. R. 175;

that, — “If any person guilty of any such felony or misdemeanor, as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence, by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid, the court before whom any person shall be tried for any such felony or misdemeanor, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner.”

It has been settled, that on the true construction of this statute, the property in the chattel becomes re-vested in the original owner upon the conviction of the felon, even though no writ or order of restitution has been made by the Court.⁶ But [even where the goods had been stolen] an action was held not to be maintainable against an innocent purchaser in market overt, who had disposed of the stolen goods before the conviction of the thief; although he was, while the goods still remained in his possession, notified of the robbery by the original owner.⁷

§ 13. * [It has recently been decided that the statute has no application in cases of false pretences (*i.e.* where the property in the goods has passed), and therefore that the title of a *bonâ fide* purchaser from the person who has obtained the goods by false pretences is paramount to the title of the original owner, even after the conviction.¹

It should be observed, however, that in *Lindsay v. Cundy*²

Moyce v. Newington, L. R. 4 Q. B. Div. 32; *Lindsay v. Cundy*, L. R. 1 Q. B. Div. 348. *Vide post*, § 519, note 1.

⁶ *Scattergood v. Sylvester*, 15 Q. B. 506; 19 L. J. Q. B. 447. See also *Peer v. Humphrey*, 2 A. & E. 495; *Queen v. Horan*, Ir. 6 C. L. 293; *Reg. v. Stancliff*, 11 Cox C. C. 318.

⁷ *Horwood v. Smith*, 2 T. R. 750;

Lindsay v. Cundy, 1 Q. B. D. 348; see § 519, note 1.

¹ *Moyce v. Newington*, L. R. 4 Q. B. D. 32, where the sale was not in market overt.

² 1 Q. B. D. 348, not overruled on this point. Blackburn J. gives a valuable exposition of the statutes, and expressly dissents from Nickling *v. Heaps*, 21 L. T. N. S. 754.

upon the authority of which case *Moyce v. Newington* was decided, Lush J. was careful to say (p. 362): "The plaintiffs may, *upon conviction*, acquire a fresh title to the goods, but then they must get the goods *from the person in whose hands they can find them, or what may be the substitute for the goods.*" All that *Lindsay v. Cundy* seems to decide is that, *until conviction*, a *bonâ fide* purchaser from the person who had obtained the goods by false pretences had a good title; and if, *before conviction*, he had parted with the goods, no action of trover could be maintained against him. In other words, the title to the goods revests in the original owner as from the date of the conviction, and does not relate back to the time of the fraudulent taking.

It is otherwise where the *possession* only of the goods has been obtained by some trick, or by theft, without the property passing: and the earlier cases of *Scattergood v. Sylvester* (15 Q. B. 506), and *Peer v. Humphrey* (2 A. & E. 495), are in this way reconcilable with *Lindsay v. Cundy* and *Moyce v. Newington*.

In *Walker v. Matthews*,⁸ two cows in calf had been stolen from the plaintiff's farm on the 7th of June, 1880. On the 11th of June they were sold in market overt to a dealer, who afterwards resold them to the defendant, who was a *bonâ fide* purchaser. After the conviction of the thief, on the 5th of April, 1881, the plaintiff demanded back the cows from the defendant, who refused to give them up. Meantime the cows had calved. In an action for the return of the [*11] cows, the *defendant set up a counter-claim for the cost of their keep between the time of the sale and the conviction: held, that *as the cows were the defendant's property up to the time of the conviction* of the thief, the counter-claim was not maintainable. The defendant, it is to be observed, did not dispute the plaintiff's title to the calves, although they were born during the time when the property in the cows was vested in the defendant.]

§ 14. When an innocent purchaser of stolen goods has been forced to make restitution to the prosecutor of the

⁸ 8 Q. B. D. 109.

thief, the 30 & 31 Vict. c. 35, s. 9, enacts that upon the conviction of the thief it shall be lawful for the Court to order that any money taken from him on his apprehension shall be applied. to reimbursing the purchaser the price paid by him.

§ 15. It was at one time supposed that where goods had been stolen, an owner could not recover them from an innocent vendee who had bought them, *not* in market overt, until he had done his duty in prosecuting the thief. But the cases of *Gimson v. Woodfall*¹ and *Peer v. Humphrey*² were overruled in *White v. Spettigue*,³ where it was held, on the authority of *Stone v. Marsh*,⁴ and *Marsh v. Keating*,⁵ that the obligation of the plaintiff to prosecute the thief does not apply where the action is against a third party innocent of the felony. And in *Lee v. Bayes*⁶ the law was stated to be settled in conformity with the decision in *White v. Spettigue*.³

In *Wells v. Abrahams*,⁷ on the trial of an action of trover, the evidence established a *prima facie* case of felony, and after verdict for plaintiff a new trial was moved for on that ground and on the further ground shown by affidavit, that since verdict the plaintiff had prosecuted the defendant criminally. But held that the judge was bound to try the cause on the record as it stood at *Nisi Prius*, and could not nonsuit the plaintiff — and the verdict was upheld.

[In *Ex parte Ball in re Shepherd*,⁸ the doctrine in question * was very fully considered, and the Court [*12] of Appeal, while hesitating to say that the alleged rule had no existence in practice, expressed a decided opinion that the disability to sue was confined to the person injured by the felony, and therefore had no application to the case before them, so as to bar a claim made by the injured party's trustee in bankruptcy against the felon's estate. Bramwell and James L.JJ. dwelt strongly upon the diffi-

¹ 2 C. & P. 41.

² 2 Ad. & E. 495; 4 N. & M. 430.

³ 13 M. & W. 603.

⁴ 6 B. & C. 551.

⁵ 1 Bing. N. C. 198.

⁶ 18 C. B. 599.

⁷ L. R. 7 Q. B. 554.

⁸ 10 Ch. D. 667, C. A. See also *Midland Insurance Company v. Smith*, 6 Q. B. D. 561, where all the cases are reviewed by Watkin Williams J.

culties which from every point of view beset the application of the doctrine.]

§ 16. For more than three centuries it has been found necessary to make special provision in relation to the sale of *horses* in market overt, on account of the peculiar facility with which these animals, when stolen, can be removed from the neighborhood of the owner and disposed of in markets and fairs.¹

The statute of 2 & 3 P. & M. c. 7, passed in 1555, and that of 31 Eliz. c. 12, in 1589, contain the rules and regulations applicable to this subject. The principal provisions of the first statute are, that there shall be a certain special place appointed and limited out in all fairs and markets overt where horses are sold; that a toll-keeper shall be appointed to keep this place from ten o'clock in the morning until sunset, and he shall take the tolls for all horses at that place and within those hours, and not at any other time or place: that the parties to the bargain shall be before him present when he takes the toll: and that he shall write in a book, to be kept for that purpose, the names, surnames, and dwelling-places of the parties, and a full description of the animal sold. The property in the horse is not to pass to the buyer, unless the animal be openly exposed for one hour at least at the place and within the hours above specified; and unless the parties come together and bring the animal to the toll-keeper or book-keeper (where no toll is paid), and have the entries properly made in the book. By the second statute, it is required that the toll-keeper or book-keeper shall take upon himself "perfect knowledge" of the vendor, and "of his true Christian name, surname, and place of dwelling or resiancy;" or that the vendor shall bring to the keeper one sufficient and credible person that can testify that he knows the vendor, and

[*13] in such case the name and residence of the * person so testifying, as well as those of the vendor, are to be recorded in the book, and the "very true price or value" given for the horse; and in case of failure to comply with these provisions, the sale is to be void. The Act also pro-

¹ *Browning v. Magill*, 2 Harr. & J. (Md.) 308.

vides that the original owner may take back his horse from the purchaser, even when the sale has been regularly made in market overt according to the rules laid down in the statute, on repayment to the purchaser of the price paid by him, provided the demand on the purchaser be made within six months from the date of the felony.

The decisions on these two statutes are collected in Bacon's Abr. Fairs and Markets, and in Com. Dig. Market, E. Their provisions have been found so effective in putting an end to the mischief which they were intended to prevent, that there are very few modern cases on the subject.²

In *Lee v. Bayes*,³ it was held that the sale of a horse at auction in a repository out of the city of London, was not a sale in market overt, Jervis C.J. saying that market overt was "an open, public, and *legally-constituted* market." On the question, What is a legally-constituted market? the reader is referred to the case of *Benjamin v. Andrews* (?), decided in the Common Pleas in 1858.

[The protection attendant upon a sale in a market overt is not confined to ancient markets created by charter or prescription, but extends to modern markets established under powers conferred by Act of Parliament.⁴]

§ 17. The second exception to the rule that one not the owner cannot make a valid sale of personal chattels, also arises out of the 24 & 25 Vict. c. 96, s. 100, already quoted, which directs that — "If it shall appear before any award or order made, that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument,¹ shall have been *bonâ fide* taken or received by transfer or *delivery, by some person or body corpo- [*14] rate, for a just and valuable consideration, without

² See *Joseph v. Adkins*, 2 Stark. 76; *Lee v. Bayes*, 18 C. B. 599; *Moran v. Pitt*, 52 L. J. Q. B. 47; 21 W. R. 554.

³ 5 C. B. N. S. 299; 27 L. J. M. C. 310.

⁴ *Ganley v. Ledwidge*, 10 Ir. R. C. L. 33.

¹ *Negotiable securities*. — It was formerly held that if the holder took a negotiable instrument under suspicious circumstances or without due caution, or inquiry, he was not deemed to be a *bonâ fide* holder without notice, although he paid full value therefor. *Matthews v. Poythress*, 4 Ga. 237;

any reasonable cause to suspect that the same had by any felony or misdemeanor been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the court shall not award or order the restitution of such security: Provided also, that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent entrusted with the possession of goods or documents of title to goods for any misdemeanor against this Act."

This clause was intended to prevent the statute from operating in such manner as to interfere with a settled rule of the law merchant, namely, that one not the owner, even the thief,

Davis v. McCready, 17 N. Y. 230, s. c. 72 Am. Dec. 461; *Steinhart v. Boker*, 34 Barb. (N. Y.) 436; *Hall v. Wilson*, 16 Barb. (N. Y.) 550; *Snyder v. Riley*, 6 Pa. St. 164; s. c. 47 Am. Dec. 452; *Goodman v. Simonds*, 61 U. S. (20 How.) 363; bk. 15, L. ed. 937; *Goodman v. Harvey*, 4 Ad. & El. 870; *Down v. Halling*, 4 Barn. & Cres. 330; *Gill v. Cubitt*, 3 Barn. & Cres. 466; *Easley v. Crockford*, 10 Bing. 243; *Beckwith v. Corral*, 3 Bing. 444; *Snow v. Peacock*, 3 Bing. 406; *Slater v. West*, 1 Dan. & Ll. 15; *Raphael v. Bank of England*, 17 C. B. 161; s. c. 33 Eng. L. & Eq. 276; *Chitty on Bills*, 277, 284; 3 Kent Com. *81.

Negligence of purchaser — English doctrine. — The rule as to negligence of the party taking defective title, laid down in *Gill v. Cubitt*, 3 Barn. & Cres. 466; and *Down v. Halling*, 4 Barn. & Cres. 330, is no longer law in England. *Bank of Bengal v. McLeod*, 5 Moore's Indian Ap. 1; s. c. 7 Moore P. C. 35; 13 Jur. 945. But yet where a party takes a bill or negotiable instrument, under circumstances calculated to excite suspicion, and, possessing the means of knowledge, wilfully abstains from making inquiry, he takes the instrument with notice of whatever fraud may exist, if any. See *Jones v. Gordon*, L. R. 2 Ap. Cas. 616; s. c. 37 L. J. N. S. 477;

26 W. R. 472; *May v. Chapman*, 16 Mees. & W. 361; *Bayles on Bills*, 119.

American doctrine. — In this country, before maturity, such instruments are negotiated by simple delivery. *Brush v. Scribner*, 11 Conn. 388; s. c. 29 Am. Dec. 303; *Spooner v. Holmes*, 102 Mass. 503; s. c. 3 Am. Rep. 491; *Commonwealth v. Emigrant Industrial Savings Bank*, 98 Mass. 12; *Wyer v. Dorchester & Milton Bank*, 65 Mass. (11 Cush.) 51; *Worcester County Bank v. Dorchester and Milton Bank*, 64 Mass. (10 Cush.) 488; s. c. 57 Am. Dec. 120; *Wheeler v. Guild*, 37 Mass. (20 Pick.) 545; s. c. 32 Am. Dec. 231; *Seybel v. National Currency Bank*, 54 N. Y. 288; s. c. 13 Am. Rep. 583; *Hall v. Wilson*, 16 Barb. (N. Y.) 548; *Vermilye v. Adams Express Co.*, 88 U. S. (21 Wall.) 138; bk. 22, L. ed. 609; *Goodman v. Simonds*, 61 U. S. (20 How.) 343; bk. 15, L. ed. 458; *Swift v. Tyson*, 41 U. S. (16 Pet.) 1; bk. 10, L. ed. 865.

Consent of holder. — The sale of a promissory note involves a contract between the holder and the purchaser, and a stranger to the note, without any interest to protect or rights to preserve, cannot, by giving the holder the amount due on the note, become a purchaser of the same, without the consent of the holder. *Binford v. Adams*, 104 Ind. 41, s. c. 1 West. Rep. 911.

may make a valid transfer of negotiable instruments, if they are in the usual state in which they commonly pass on delivery from man to man, like coin, according to the usage of trade; provided the buyer has been guilty of no fraud in taking them, for in that case he would be forced to bear the loss.²

§ 18. Another case, in which one not the owner of goods may make valid sale of them, is that of the pawnee.¹ He

² *Grant v. Vaughan*, 3 Burr. 1516; *Lang v. Smith*, 7 Bing. 284; *Gagier v. Mieville*, 3 B. & Cr. 35; *Crook v. Jadis*, 5 B. & Ad. 909; *Backhouse v. Harrison*, 5 B. & Ad. 1105; *Bank of Bengal v. M'Leod*, 7 Moo. P. C. 35; *Goodman v. Harvey*, 4 Ad. & El. 870; *Uther v. Rich*, 10 Ad. & E. 784; *Raphael v. Bank of England*, 17 C. B. 161; 25 L. J. C. P. 33; *Seal v. Dent*, 8 Moo. P. C. 319; *Gill v. Cubitt*, 3 B. & Cr. 466; *Whistler v. Forster*, 32 L. J. C. P. 161. See also numerous other cases cited in notes to *Miller v. Race*, 1 Sm. L. C. 516 (Ed. 1879); *Byles on Bills* (13th ed.), p. 165.

American authorities. — *Brush v. Scribner*, 11 Conn. 388; s. c. 29 Am. Dec. 303; *Hall v. Hale*, 8 Conn. 336; *Matthews v. Poythress*, 4 Ga. 287; *Jones v. Nellis*, 41 Ill. 482; s. c. 89 Am. Dec. 389; *Spooner v. Holmes*, 102 Mass. 503; s. c. 3 Am. Rep. 491; *Merriam v. Granite Bank*, 74 Mass. (8 Gray) 254; *Wheeler v. Guild*, 37 Mass. (20 Pick.) 545; s. c. 32 Am. Dec. 231; *Cone v. Baldwin*, 29 Mass. (12 Pick.) 545; *Crosby v. Grant*, 36 N. H. 273; *Newton v. Porter*, 69 N. Y. 133, 137; s. c. 25 Am. Dec. 152; *Seybel v. Nat. Currency Bank*, 54 N. Y. 288; s. c. 13 Am. Rep. 583; *Magee v. Badger*, 30 Barb. (N. Y.) 246; *Pringle v. Phillips*, 5 Sandf. (N. Y.) 157; *Greneaux v. Wheeler*, 6 Tex. 515; *Roth v. Colvin*, 32 Vt. 125; *Sanford v. Norton*, 14 Vt. 228; *Vermilye v. Adams Express Co.*, 88 U. S. (21 Wall.) 138; bk. 22, L. ed. 609; *Goodman v. Simonds*, 61 U. S. (20 How.)

343; bk. 15, L. ed. 934; *Pothonier v. Dawson*, Holt, 385.

¹ *Sale by the pawnee.* — A pledge of personal property merely passes to the pledgee the possession, with a right to retain until the debt is paid, or other engagement is fulfilled, for which the article pledged is given as security; but upon the failure of the pledgor to fulfil his engagement or redeem the pledge, the pledgee may make a valid sale of the article pledged, and pass a good title to the purchaser. See *Washburn v. Pond*, 84 Mass. (2 Allen) 474; *Wheeler v. Newbould*, 16 N. Y. 392; *Stearns v. Marsh*, 4 Den. (N. Y.) 227; s. c. 47 Am. Dec. 248; *Loucketts v. Townsend*, 3 Tex. 119; s. c. 49 Am. Dec. 723. The fact that a pledgor is bankrupt will not deprive the pledgee of his right to sell on failure of payment or performance. *Rasch v. His Creditors*, 1 La. An. 31; *Jerome v. McCarter*, 94 U. S. (4 Otto) 734; bk. 24, L. ed. 136; *Martin v. Reid*, 11 C. B. N. S. 730; *Pigot v. Cubley*, 15 C. B. N. S. 701; *Johnston v. Stear*, 15 C. B. N. S. 330.

Sale how made. — The pawnee may sell, either at a judicial sale, upon foreclosure of the pledge, or by a sale without the supervision of the courts, in a public manner, after notice to the pawnee. *Washburn v. Pond*, 84 Mass. (2 Allen) 474; *Elder v. Rouse*, 15 Wend. (N. Y.) 218; *Davis v. Funk*, 39 Pa. St. 243; s. c. 80 Am. Dec. 510; *Story on Bail*. sec. 310; 2 Kent Com. 582; *Tucker v.*

has the legal power to sell goods pledged to him, if the pawnor make default in payment at the stipulated time; and

Wilson, 1 P. Wms. 261; 1 Schouler on Pers. Prop. sec. 407; Kemp v. Westbrook, 1 Ves. Sr. 278. In the mode prescribed by the general law, or by local statutes, or by some special agreement of the parties. Rhorle v. Stidger, 50 Cal. 207; Robinson v. Hurley, 11 Iowa, 410; s. c. 79 Am. Dec. 497; Stevens v. Bell, 6 Mass. 339; Mowry v. Wood, 12 Wis. 413; Cal. Civ. Code, secs. 3005, 3011; Mass. Pub. Stats. ch. 192, secs. 10 & 12; Schouler on Bail. 222; 1 Schouler on Pers. Prop. sec. 408.

Necessity of notice. — To render the sale valid, it must be made with entire good faith, and in the absence of a stipulation to a contrary effect in the contract, the pledgee must call upon the pledgor and give him reasonable notice of the time and place of the proposed sale. Gay v. Moss, 34 Cal. 125; Hyatt v. Argenti, 3 Cal. 151; Morgan v. Dod, 3 Colo. 551; Stevens v. Hurlburt Bank, 31 Conn. 146; Cushman v. Hayes, 46 Ill. 145; Baltimore Marine Ins. Co. v. Dalrymple, 25 Md. 269; Robinson v. Hurley, 11 Iowa, 410; s. c. 79 Am. Dec. 497; Washburn v. Pond, 84 Mass. (2 Allen) 474; Parker v. Brancker, 39 Mass. (22 Pick.) 40; Goldsmith v. Worthington M. E. Church Trustees, 25 Minn. 202; Ogden v. Lathrop, 65 N. Y. 162; Bryan v. Baldwin, 52 N. Y. 232; Markham v. Jandon, 41 N. Y. 235; Wilson v. Little, 2 N. Y. 448; s. c. 51 Am. Dec. 307; Lewis v. Varnum, 12 Abb. (N. Y.) Pr. 308; Lewis v. Graham, 4 Abb. (N. Y.) Pr. 106; McNeil v. Tenth National Bank, 55 Barb. (N. Y.) 59; Genet v. Howland, 45 Barb. (N. Y.) 560; McEachron v. Randles, 34 Barb. (N. Y.) 307; Rankin v. McCullough, 12 Barb. (N. Y.) 103; Millikin v. Dehon, 10 Bosw. (N. Y.) 325; Campbell v. Parker, 9 Bosw. (N. Y.) 322; Cortelyou v. Lansing, 2 Cai.

Cas. (N. Y.) 200; Wheeler v. Newbould, 5 Duer, (N. Y.) 29; s. c. 16 N. Y. 392; Brown v. Ward, 3 Duer, (N. Y.) 660; Haskins v. Patterson, 1 Edm. Sel. Cas. (N. Y.) 120; Garlick v. James, 12 Johns. (N. Y.) 146; s. c. 7 Am. Dec. 294; Wilson v. Little, 1 Sandf. (N. Y.) 351; Conyngham's Appeal, 57 Pa. St. 474; Diller v. Brubaker, 52 Pa. St. 498; Davis v. Funk, 39 Pa. St. 243; s. c. 80 Am. Dec. 510; Mowry v. Wood, 12 Wis. 413; Story on Bail. sec. 308. However, former notice of the time and place of the sale is not necessary where the pledgor already has actual knowledge. Alexandria, &c. R. R. v. Burke, 22 Gratt. (Va.) 254. Neither is notice necessary where it is rendered impossible by the pledgor's acts. City Bank of Racine v. Babcock, 1 Holm. C. C. 181. And where the pledgor consents to a proposed sale, or accepts the proceeds thereof, or in any other manner ratifies it, he cannot afterwards object that the sale was not made according to the laws regulating the sales of pledged property. Child v. Hug, 41 Cal. 519; Hamilton v. State Bank, 22 Iowa, 306; Clark v. Brisbin, 20 La. An. 70; Genet v. Howland, 45 Barb. (N. Y.) 560. But the mere inability to find the pledgor will not excuse the necessity of making demand of and serving notice upon him. Strong, &c. v. National Banking Assoc., 45 N. Y. 718. However, where the pledgor has gone beyond the seas the demand may be made of, and the notice served upon, his agent. Potter v. Thompson, 19 R. I. 1.

Irregularities in sale. — The pledgor cannot treat a sale without notice, or without a full notice, or which is otherwise irregular or informal, as in itself a conversion of the property; but he must, as a prerequisite to suing either the pledgee or a purchaser from the

this he may do without taking any legal proceedings against the pawnor.²

pledgee, tender the amount he owes; and can only recover damages for the conversion of the article, over and above the amount of his indebtedness. See *Bulkeley v. Welch*, 31 Conn. 339; *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269; *Lewis v. Mott*, 36 N. Y. 395; *Kidney v. Persons*, 41 Vt. 386; *Talty v. Freedman's Savings & Trust Co.*, 93 U. S. (3 Otto) 321; bk. 23, L. ed. 886. *Schouler on Bailments*, 209, 210.

Personal action against pledgor.— But it seems that where the pledgor has gone beyond the seas the only safe way is (1) to proceed against the debtor personally. That the pledgee may proceed against the pledgor personally is abundantly settled by the authorities. *Dugan v. Sprague*, 2 Ind. 600; *Robinson v. Hurley*, 11 Iowa, 410; s. c. 79 Am. Dec. 497; *Cleverly v. Brackett*, 8 Mass. 150; *Buck v. Ingersoll*, 52 Mass. (11 Met.) 226; *Whitaker v. Sumner*, 37 Mass. (20 Pick.) 399; *Whitwell v. Brigham*, 36 Mass. (19 Pick.) 117; *Townsend v. Newell*, 31 Mass. (14 Pick.) 332; *Beckwith v. Sibley*, 28 Mass. (11 Pick.) 482; *Butterworth v. Kennedy*, 5 Bosw. (N. Y.) 143; *Elder v. Rouse*, 15 Wend. (N. Y.) 218; *Case v. Boughton*, 11 Wend. (N. Y.) 106; *Langdon v. Buel*, 9 Wend. (N. Y.) 80; *Arendale v. Morgan*, 5 Sneed (Tenn.) 703; *Bank of Rutland v. Woodruff*, 34 Vt. 89. Or (2) bar his right to redemption by an equitable suit to foreclose. So, also, is this the appropriate remedy where the pledge consists of a chose in action, except those having a recognized market value, such as stocks, government bonds, and the like. *Donohoe v. Gamble*, 38 Cal. 340; *Gay v. Moss*, 34 Cal. 125; *Boyn-ton v. Payrow*, 67 Me. 586; *Bowman v. Wood*, 15 Mass. 534; *Wheeler v. Newbould*, 16 N. Y. 392; *Stearns v. Marsh*, 4 Den. (N. Y.) 227; s. c. 47 Am. Dec. 248; *Garlick v. James*, 12

John. (N. Y.) 146; s. c. 7 Am. Dec. 294; *Hart v. Ten Eyck*, 2 Johns. Ch. (N. Y.) 62; *De Lisle v. Priestman*, 1 Browne (Pa.) 176.

Pawnee cannot purchase.— The pawnee cannot become the purchaser at the sale of the pledge; and where the pawnee does purchase, the pledgor may treat the sale as void or valid at his option. If he elects to treat it as void, the relation of pledgor and pledgee still subsists. *Stokes v. Frazier*, 72 Ill. 428; *Bank of Old Dominion v. Dubuque, &c. R. R. Co.*, 8 Iowa, 277; s. c. 74 Am. Dec. 302; *Brother v. Saul*, 11 La. An. 223. And the fact that the sale to the pledgee is made through a broker, at public auction, makes no difference. *Bryson v. Rayner*, 25 Md. 424; *Baltimore Marine Ins. Co. v. Dalrymple*, 25 Md. 269.

Cannot sell before maturity.— Unless specially authorized, by the agreement, a pawnee cannot sell property pledged to him as security for a debt or other obligation, before such debt or obligation is due. *Wheeler v. Newbould*, 16 N. Y. 400; *Butts v. Burnett*, 6 Abb. (N. Y.) Pr. (N. S.) 303; *McNeil v. Tenth Nat. Bank*, 55 Barb. (N. Y.) 65; *Campbell v. Parker*, 9 Bosw. (N. Y.) 326; *Atlantic, etc. Ins. Co. v. Boies*, 6 Duer (N. Y.) 586; *Wilson v. Little*, 1 Sandf. (N. Y.) 357.

Cannot be compelled to sell.— In the absence of a stipulation to that effect in the contract the pawnee cannot be compelled to sell the article pledged upon failure of payment or performance (*Rozet v. McClellan*, 48 Ill. 344; *Badlam v. Tucker*, 18 Mass. (1 Pick.) 400; s. c. 11 Am. Dec. 202; *Franklin Saving Institution v. Preetorius*, 6 Mo. App. 470); and will not be held liable for loss in case the security when sold brings less than its estimated value (*Ainsworth v. Bowen*, 9 Wis. 348).

² *Pothonier v. Dawson*, Holt, 385;

[*15] § 19. * The sheriff, as an officer on whom the law confers a power, may sell the goods of the defendant in execution, and confer a valid title on the purchaser;¹ and this title will not be affected, although the writ of execution be afterwards set aside.²

Tucker v. Wilson, 1 P. Williams, 261; Lockwood v. Ewer, 9 Mod. 278; Martin v. Read, 11 C. B. N. S. 730, and 31 L. J. C. P. 126; Johnston v. Stear, 15 C. B. N. S. 330, and 33 L. J. C. P. 130; Pigot v. Cubley, 15 C. B. N. S. 701, and 33 L. J. C. P. 134; 1 Sm. L. C. 227, ed. 1879; Halliday v. Holgate, L. R. 3 Ex. 299. By the above case of Martin v. Read, and by Reeves v. Capper, 5 Bing. N. C. 136, and Langton v. Waring, 18 C. B. N. S. 315, it appears that there may be a valid pledge although the goods remain in, or are returned to, the actual possession of the pawnor as trustee for the pawnee.

Respecting the American rule, as between the pledgor and pledgee, see Donohoe v. Gamble, 38 Cal. 34; Gay v. Moss, 34 Cal. 125; Stevens v. Hurlburt Bank, 31 Conn. 146; Cooper v. Ray, 47 Ill. 53; Cushman v. Hayes, 46 Ill. 145; Hamilton v. State Bank, 22 Iowa, 306; Washburn v. Pond, 84 Mass. (2 Allen) 474; Way v. Davidson, 78 Mass. (12 Gray) 465; Macomber v. Parker, 31 Mass. (14 Pick.) 497; Sumner v. Halst, 29 Mass. (12 Pick.) 76; Parshall v. Egbert, 54 N. Y. 18; Strong v. National Bank Association, 45 N. Y. 718; Lewis v. Mott, 36 N. Y. 395; Wheeler v. Newbould, 16 N. Y. 392; Wilson v. Little, 2 N. Y. 443; s. c. 51 Am. Dec. 307; Hays v. Riddle, 1 Sandf. (N. Y.) 227; s. c. 47 Am. Dec. 248; Conyngnam's Appeal, 57 Pa. St. 474; Davis v. Funk, 39 Pa. St. 243; s. c. 80 Am. Dec. 510; Potter v. Thompson, 10 R. I. 1; Alexandria Railroad v. Burke, 22 Gratt. (Va.) 254; Ainsworth v. Bowen, 9 Wis. 348; City Bank of Racine v. Babcock, 1 Holmes C. C. 180.

¹ As a general rule a sheriff cannot buy at his own sale. Perkins v. Thompson, 3 N. H. 144. However, such a purchase was upheld on the facts presented in Smith v. Smith, 2 Oldright (N. S.) 303.

² Anon. Dyer, 363 a, pl. 24; Turner v. Felgate, 1 Lev. 95; Manning's Case, 8 Co. 91; Doe dem. Emmett v. Thorn, 1 M. & S. 425; Doe v. Murlass, 6 M. & S. 110; Farrant v. Thompson, 5 B. & Ald. 826; Lock v. Seilwood, 1 Q. B. 736.

Sales by sheriff.—It has been said that public sales, made on execution by a sheriff, resemble the English sales in market overt and pass a good title to the buyer, even though the goods sold did not belong to the execution debtor; but it is now well established that one purchasing at a sheriff's sale acquires no title to the property, unless it belong to the judgment debtor. Thus where A purchases the goods of B in an execution against C, if he takes the goods he will be liable to B in trover for their value. Boggs v. Fowler, 16 Cal. 559; s. c. 76 Am. Dec. 561; Bartholomew v. Warner, 32 Conn. 102; Williams v. Miller, 16 Conn. 144; McLagan v. Brown, 11 Ill. 519; Williams v. Cummins, 4 J. J. Marsh. (Ky.) 637; Coombs v. Gorden, 59 Me. 111; Stinson v. Ross, 51 Me. 566; Symonds v. Hall, 37 Me. 354, 357, 358; s. c. 59 Am. Dec. 53; Barney v. Patterson, 6 Harr. & J. (Md.) 182; Johnson v. Babcock, 90 Mass. (8 Allen) 583; Champney v. Smith, 81 Mass. (15 Gray) 512; Buffum v. Deane, 62 Mass. (8 Cush.) 41; Bryant v. Whitcher, 52 N. H. 158; Homesley v. Hogue, 4 Jones (N. C.) L. 481; Jermon v. Lyon, 81 Pa. St. 107;

This protection, however, was held by the Court of Queen's Bench not to be available in favor of a purchaser of goods

Duff v. Wynkoop, 74 Pa. St. 300; *Spade v. Burner*, 72 Pa. St. 57; *Wilkinson's Appeal*, 65 Pa. St. 189; *Shearick v. Huber*, 6 Binn. (Pa.) 2; *Hays v. Shannon*, 5 Watts (Pa.) 548; *Stone v. Ebberly*, 1 Bay (S. C.) L. 317; *Arendale v. Morgan*, 5 Sneed (Tenn.) 703; *Sanborn v. Kittredge*, 20 Vt. 640; s. c. 50 Am. Dec. 58; *Griffith v. Fowler*, 18 Vt. 390; *Herrick v. Graves*, 16 Wis. 157; *Bank of United States v. Bank of Washington*, 31 U. S. (6 Pet.) 8; bk. 8, L. ed. 299; *Burke v. McWhirter*, 35 Up. Can. Q. B. 1; *Kirby v. Cahill*, 6 Up. Can. Q. B. (O. S.) 510.

As to sales by officers of the United States government, see *Black v. Jones*, 64 N. C. 318; *Wilson v. Franklin*, 63 N. C. 259; *Parham v. Ripley*, 4 Coldw. (Tenn.) 5, 10; *Dawson v. Susong*, 1 Heisk. (Tenn.) 243; *Arendale v. Morgan*, 5 Sneed (Tenn.) 703, 712. See, also, *Ventress v. Smith*, 35 U. S. (10 Pet.) 161; bk. 9, L. ed. 382; *Story on Sales*, sec. 188.

A sale on erroneous or avoidable judgment by a sheriff in execution of the judgment, carries a valid title, because the judgment is valid until reversed, and though reversed is regarded as having been valid. See *Stinson v. Ross*, 51 Me. 556; *Park v. Darling*, 58 Mass. (4 Cush.) 197; *Gay v. Smith*, 38 N. H. 171; *Woodcock v. Bennet*, 1 Cow. (N. Y.) 711; s. c. 13 Am. Dec. 568; *Jackson v. Cadwell*, 1 Cow. (N. Y.) 623; *Feger v. Kroh*, 6 Watts (Pa.) 294; *Bank of United States v. Bank of Washington*, 31 U. S. (6 Pet.) 8; bk. 8, L. ed. 299. However, it is otherwise where the judgment is absolutely void. *Caldwell v. Walters*, 18 Pa. St. 79; s. c. 55 Am. Dec. 592; *Campbell v. Kent*, 3 Pen. & Watts (Pa.) 72; *Alberty v. Dawson*, 1 Binn. (Pa.) 105; *Camp v. Wood*, 10 Watts (Pa.) 118; *Godfrey's Case*, 11 Co. Rep. 44; *Warter*

v. Perry, Cro. Eliz. 199; *Randall's Case*, 2 Mod. 308; see also note 3, this section. And a sale on execution under a judgment, which has been satisfied, conveys no title. *State v. Salyers*, 19 Ind. 432; *Laval v. Rowley*, 17 Ind. 36; *King v. Goodwin*, 16 Mass. 63; *Hammatt v. Wyman*, 9 Mass. 138; *Nielson v. Nielson*, 5 Barb. (N. Y.) 565; *Jackson v. Cadwell*, 1 Cow. (N. Y.) 622; *Wood v. Colvin*, 2 Hill. (N. Y.) 566; s. c. 38 Am. Dec. 598; *Hoffman v. Strohecker*, 7 Watts (Pa.) 86; s. c. 32 Am. Dec. 740. But it will be otherwise if the judgment debtor is present at the sale and suffers a *bonâ fide* purchaser to buy and pay for the property.

To constitute a levy as against a creditor or vendee of the debtor, the sheriff must exercise dominion over the goods, must have them in his control, or do some such act, in relation thereto, for which he would be liable in trespass, except for the protection of the process, under which he acts. *Boggs v. Fowler*, 16 Cal. 559; s. c. 76 Am. Dec. 561; *Bartholomew v. Warren*, 32 Conn. 98; *Bassett v. Lockard*, 60 Ill. 164; *Rodgers v. Smith*, 2 Ind. 526; *Cameron v. Logan*, 8 Iowa, 434; *McGhee v. Ellis*, 4 Litt. (Ky.) 244; s. c. 14 Am. Dec. 124; *Champney v. Smith*, 81 Mass. (15 Gray) 512; *Walke v. Moody*, 65 N. C. 599; *Islay v. Stewart*, 4 Dev. & B. (N. C.) L. 160; *Staats v. Bristow*, 73 N. Y. 204; *Smith v. Painter*, 5 Serg. & R. (Pa.) 223; s. c. 9 Am. Dec. 344; *Freeman v. Caldwell*, 10 Watts (Pa.) 9; *Walton v. Reager*, 20 Tex. 103; *Griffith v. Fowler*, 18 Vt. 390.

On execution sale there is no implied warranty, but the doctrine, *caveat emptor*, applies; hence if the judgment debtor has no interest the purchaser has none. *Cobb v. Cage*, 7 Ala. 619; *Rowan v. Refeld*, 31 Ark. 648; *Taft v. Manlove*, 14 Cal. 47;

distraigned under a warrant issued by two justices of the peace to the constable, *where the warrant was on the face of it illegal*.³

§ 20. Another instance of the power of one who is not owner to transfer the property in goods held in his possession, is that of the master of a vessel, who is vested by law with authority to sell the goods of the shippers of the cargo in case of absolute necessity;¹ as where there is a total ina-

s. c. 73 Am. Dec. 610; *Godfrey v. Brown*, 86 Ill. 454; *Forth v. Pursley*, 82 Ill. 152; *Harris v. Evans*, 81 Ill. 419; *Techmeyer v. Waltz*, 49 Iowa, 645; *Cheshire National Bank v. Jewett*, 119 Mass. 241; *Butterfield v. Clemence*, 64 Mass. (10 Cush.) 269; *Shephard v. Butterfield*, 58 Mass. (4 Cush.) 425; *Hemmenway v. Wheeler*, 31 Mass. (14 Pick.) 410; s. c. 25 Am. Dec. 411; *Bryant v. Osgood*, 52 N. H. 182; *Price v. Shipps*, 16 Barb. (N. Y.) 585; *Rives v. Porter*, 7 Ired. (N. C.) L. 74; *Murphy v. Swadener*, 33 Ohio St. 85; *Reynolds v. Ayres*, 5 Allen (N. B.) 333; *Blades v. Aundale*, 1 M. & S. 711; *Ackland v. Paynter*, 8 Price, 95. But a levy against the debtor may be good when it would not be good as to third person. See *Taffits v. Manlove*, 14 Cal. 47; s. c. 73 Am. Dec. 610; *Forth v. Pursley*, 82 Ill. 152. In the former case the court say that the distinction between the requisites of a levy as to the debtor, and as to third person, is not based upon a legal requisite as to the levy itself, but that the conduct of the defendant, either by positive or negative acts, may amount to a waiver or an estoppel or an agreement that that shall be a levy, which without such conduct would not be sufficient. But see *Dean v. Thatcher*, 32 N. J. L. (3 Vr.) 470; *Caldwell v. Fifield*, 24 N. J. L. (4 Zab.) 161; *Brewster v. Vail*, 20 N. J. L. (1 Spen.) 56; s. c. 38 Am. Dec. 547; *Newell v. Sibley*, 4 N. J. L. (1 South.) 381.

³ *Lock v. Sellwood*, 1 Q. B. 736.

Sale under satisfied judgment.—

All sales are void which are made under satisfied judgment, or a judgment that is void for want of jurisdiction. *Redmond v. Pakenham*, 66 Ill. 434; *State v. Salyers*, 19 Ind. 432; *Laval v. Rowley*, 17 Ind. 36; *Wood v. Colvin*, 2 Hill (N. Y.) 566; s. c. 38 Am. Dec. 598; *Kennedy v. Duncklee*, 67 Mass. (1 Gray) 65; *Caldwell v. Walters*, 18 Pa. St. 79; s. c. 55 Am. Dec. 592; *Camp v. Wood*, 10 Watts (Pa.) 118; see, also, authorities in note 2, *supra*. But in Pennsylvania it is held that a purchaser at an execution sale will not be affected by satisfaction of the judgment unless he knew of it. *Gibbs v. Neely*, 7 Watts (Pa.) 305; *Hoffman v. Strohecker*, 7 Watts (Pa.) 86; s. c. 32 Am. Dec. 740; *Samms v. Alexander*, 3 Yeates (Pa.) 268.

¹ *A sale by a master of vessel*, of the vessel and cargo, will be valid in cases of actual necessity, but they must be such as to leave him no discretion, and amount to actual constraint. See *Gates v. Thompson*, 57 Me. 442; *Howland v. India Mut. Ins. Co.*, 131 Mass. 239, 255; *Stephenson v. Pacific Mut. Ins. Co.*, 89 Mass. (7 Allen) 232, 235; *Orrok v. Commonwealth Ins. Co.*, 38 Mass. (21 Pick.) 456; *Pierce v. Ocean Ins. Co.*, 35 Mass. (18 Pick.) 83, 88; *Bryant v. Commonwealth Ins. Co.*, 30 Mass. (13 Pick.) 543, 554; s. c. 23 Mass. (6 Pick.) 131; *Winn v. Columbian Ins. Co.*, 29 Mass. (12 Pick.) 279, 282, 286; *Hall v. Franklin Ins. Co.*, 26 Mass. (9 Pick.) 466; *Gordon v. Massachusetts F. & M. Ins. Co.*, 19 Mass. (2

bility to carry the goods to their destination, or otherwise to obtain money indispensable for repairs to complete the voyage. But the purchaser acquires no title, unless such necessity exists.²

§ 21. By the Factors' Act¹ (6 Geo. IV. c. 94), s. 2, "persons entrusted with, and in possession of, any bill of lading,

Pick.) 249; American Ins. Co. v. Center, 4 Wend. (N. Y.) 55; see Myers v. Baymore, 10 Pa. St. 114; s. c. 49 Am. Dec. 586; The Amelie, 73 U. S. (6 Wall.) 18, 26; bk. 18, L. ed. 806; Post v. Jones, 60 U. S. (19 How.) 150; bk. 15, L. ed. 618; The Patapsco Ins. Co. v. Southgate, 30 U. S. (5 Pet.) 620; bk. 8, L. ed. 649; The Ship Packet, 3 Mas. C. C. 255; Pope v. Nickerson, 3 Story C. C. 465, 466; The Brig Sarah Ann, 2 Sumn. C. C. 206, 215; The Bonita, 1 Mar. L. Cas. 145; Freeman v. East India Co., 5 Barn. & Ald. 617; Morris v. Robinson, 3 Barn. & Cres. 196; Reid v. Darby, 10 East, 143; Hunter v. Parker, 7 Mees. & W. 340.

² The Gratitude, 3 Rob. Adm. 259; Freeman v. East India Company, 5 B. & A. 621; Vlierboom v. Chapman, 13 M. & W. 239; Underwood v. Robertson, 4 Camp. 138; Cannan v. Meaburn, 1 Bing. 243; Tronson v. Dent, 8 Moo. P. C. 419; Cammell v. Sewell, 3 H. & M. 617, and s. c. in Cam. Scacc. 5 H. & N. 728; 29 L. J. Ex. 350; The Australasian Steam Navigation Company v. Morse, L. R. 4 P. C. 222; Acatos v. Burns, 3 Ex. D. 289, C. A.; The Atlantic Insurance Company v. Huth, 16 Ch. D. 474, 481, C. A.; Maude and Poll. on Shipping (ed. 1881), 580.

American authorities. — Gates v. Thompson, 57 Me. 442; Butler v. Murray, 30 N. Y. 38; Fontaine v. Columbian Ins. Co., 9 Johns. (N. Y.) 28; Myers v. Baymore, 10 Pa. St. 114; s. c. 49 Am. Dec. 586; Smith v. Martin, 6 Binn. (Pa.) 262; Stillman v. Hurd, 10 Tex. 109; The Amelie,

73 U. S. (6 Wall.) 18; bk. 18, L. ed. 806; Post v. Jones, 60 U. S. (19 How.) 150; bk. 15, L. ed. 618; New Eng. Insurance Co. v. The Sarah Ann, 38 U. S. (13 Pet.) 387; bk. 10, L. ed. 213; The Ship Packet, 3 Mas. C. C. 255; Pope v. Nickerson, 3 Story C. C. 465; Jordan v. Warren Ins. Co., 1 Story C. C. 342; The Joshua Barker, Abb. Admr. 215.

¹ *Factors' act.* — Because of the variety of the statutes regulating this matter, in this country the decisions in each state must be considered with reference to the language of the statute in that state; but under all the statutes alike, we find that —

1. *The person must be truly a factor or consignee* or their agent entrusted with the possession by the owner for the purpose of sale. Stollenwerck v. Thatcher, 115 Mass. 224; Nickerson v. Darrow, 87 Mass. (5 Allen) 419; National Bank v. Dearborn, 115 Mass. 219; s. c. 15 Am. Rep. 92; Kinsey v. Leggett, 71 N. Y. 387, 395; First Nat. Bank v. Shaw, 61 N. Y. 283; Mechanics & Traders Bank v. Farmers & Mechanics Nat. Bank, 60 N. Y. 40, 52; Howland v. Woodruff, 60 N. Y. 73; Cook v. Beal, 1 Bosw. (N. Y.) 497; Dows v. National Exchange Bank, 91 U. S. (1 Otto) 618; bk. 23, L. ed. 214; Pease v. Gloahac, L. R. 1 P. C. 219, 228; Gurney v. Behrend, 3 El. & Bl. 622, 632.

2. *A factor may sell on credit and pass title in the absence of an instruction or a usage to the contrary* (Pinkham v. Crocker, 77 Me. 563; Greely v. Bartlett, 1 Me. (1 Greenl.) 172; s. c. 10 Am. Dec. 54; Goodenow v.

Indian warrant, dock warrant, warehouse-keeper's certificate, warrant, or order for the delivery of goods, shall be *deemed*

Tyler, 7 Mass. 36; s. c. 5 Am. Dec. 22; Story on Agency, secs. 6, 10); and he will not make the debt his own by taking a note payable to himself, unless he refuse to deliver it to his principal on demand, or negotiates it, or otherwise appropriates it to his own use. *Goodenow v. Tyler*, 7 Mass. 36; s. c. 10 Am. Dec. 54. But this is doubted in *Symington v. McLin*, 1 Dev. & Bat. (N. C.) L. 291, because a general power to sell implies a power to do so in the usual way, at the place and where the sale was made. *Scott v. Surman*, Willes, 407; s. c. cited in 3 Bos. & Pul. 489.

3. *A factor may not pledge goods for his own debt* where he is merely authorized to sell and has no interest in the property consigned. See *Bott v. McCoy*, 20 Ala. 578; s. c. 56 Am. Dec. 223; *Wright v. Solomon*, 19 Cal. 64; s. c. 79 Am. Dec. 196; *Gray v. Agnew*, 95 Ill. 315; *Stetson v. Gurney*, 17 La. 166; *Young v. Scott*, 25 La. An. 313; *Miller v. Schneider*, 19 La. An. 300; *Hadwin v. Fisk*, 1 La. An. 43, 74; *DeWolf v. Gardner*, 66 Mass. (12 Cush.) 19; s. c. 59 Am. Dec. 165; *Hoffman v. Noble*, 47 Mass. (6 Metc.) 74; s. c. 39 Am. Dec. 711; *Kinder v. Shaw*, 2 Mass. 398; *Benny v. Pegram*, 18 Mo. 191; *Benny v. Rhodes*, 18 Mo. 147; s. c. 59 Am. Dec. 298; *Holton v. Smith*, 7 N. H. 446; *Hazard v. Fiske*, 83 N. Y. 287; s. c. 18 Hun (N. Y.) 277; *Covill v. Hill*, 4 Den. (N. Y.) 327; *Stevens v. Wilson*, 3 Den. (N. Y.) 476; *Buckley v. Packard*, 20 Johns. (N. Y.) 421; *Laussatt v. Lippincott*, 6 Serg. & R. (Pa.) 391; s. c. 9 Am. Dec. 440; *McCreary v. Gaines*, 55 Tex. 485; s. c. 40 Am. Rep. 818; *Skinner v. Dodge*, 4 Hen. & Munf. (Va.) 432; *Hewes v. Doddridge*, 1 Rob. (Va.) 143; *Insurance Co. v. Kiger*, 103 U. S. (13 Otto) 352; bk. 26, L. ed. 433; *Warner v. Martin*, 52 U. S. (11 How.) 224; bk. 13,

L. ed. 667; *Queiroz v. Trueman*, 3 Barn. & Cres. 348; *Pickering v. Busk*, 15 East, 38; *M'Combie v. Davies*, 6 East, 538; s. c. 7 East, 5; *Martini v. Coles*, 1 Maule & S. 140; *Graham v. Dyster*, 2 Starkie, 21; *Paterson v. Tash*, 2 Strange, 1178; *Daubigny v. Duval*, 5 T. R. 604; *DeBouchout v. Goldsmid*, 4 Vea. 210; 2 Kent Com. 625; Story on Agency, sec. 78. But in those cases where the factor has a lien upon the goods, he may pledge them to the amount of his lien. *Warner v. Martin*, 52 U. S. (11 How.) 209; bk. 13, L. ed. 667.

4. *A factor cannot transfer the goods for his own debts*, and it of no consequence that the factor's debtor is ignorant of the fact that he is not the owner. See *Warner v. Martin*, 52 U. S. (11 How.) 209; bk. 13, L. ed. 667; *Newsom v. Thorton*, 6 East, 17; s. c. 2 Smith, 207; *McCombie v. Davies*, 6 East, 538; s. c. 7 East, 5; *Maanss v. Henderson*, 1 East, 337; *Guichard v. Morgan*, 4 Moore, 36; *Fielding v. Kymer*, 2 Brod. & Bing. 639; *DeBouchout v. Goldsmid*, 5 Vea. 212; *Paterson v. Tash*, 2 Str. 1178; *Daubigny v. Duval*, 5 T. R. 604; cited 1 Maule & S. 140, 147; *Graham v. Dyster*, cited 2 Starkie, 539.

5. *The factor must have actual possession of the goods*, or at least documentary evidence of title before he can make a valid sale. *Howland v. Woodruff*, 60 N. Y. 73; *Bonito v. Mosquera*, 2 Bosw. (N. Y.) 401; *Covill v. Hill*, 4 Den. (N. Y.) 327; s. c. 6 N. Y. 374; *Stevens v. Wilson*, 6 Hill (N. Y.) 512; s. c. 3 Den. (N. Y.) 472; See, also, *Cartwright v. Wilmerding*, 24 N. Y. 523; *Pegram v. Carson*, 10 Bosw. (N. Y.) 505; *Zachrisson v. Ahman*, 2 Sandf. (N. Y.) 68, 75.

6. *Sale by principal and factor.*—Where the principal has sold goods to another, but had not notified his

and taken to be the true owner of the goods so far as to give validity to sales"² made by them to buyers without notice of the fact that such vendors are not owners.³ By the fourth section of the same Act, purchasers from any "agent or *agents entrusted with any goods, wares, or merchandise, or to whom the same may be consigned," [*16] are protected in their purchases, *notwithstanding notice* that the vendors are agents; provided the purchase and payment be made in the usual and ordinary course of business, and the buyer has not notice at the time of purchase and payment, of the absence of authority in the agent to make the sale or receive the payment. And by the Amendment Act, 5 & 6 Vict. c. 89, the possession of the goods themselves is treated as having the same effect as that of bills of lading, or "other documents of title;" and a "document of title" is defined to be "any document used in the ordinary course of business, as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by endorse-

factor thereof, and the factor subsequently made a *bonâ fide* sale of the goods, which were still in his possession, and delivered them to the purchaser, the latter sale was held valid. *Jones v. Hodgkins*, 61 Me. 480. See *Western Union R. R. Co. v. Wagner*, 65 Ill. 197; *Nixon v. Brown*, 57 N. H. 34; *Crocker v. Crocker*, 31 N. Y. 507; *Rawls v. Deshler*, 28 How. (N. Y.) Pr. 66; s. c. 4 App. Cas. (N. Y.) 12. See, also, *Galvin v. Bacon*, 11 Me. 28; s. c. 25 Am. Dec. 258; *Quinn v. Davis*, 78 Pa. St. 15; *Baker v. Dinsmore*, 72 Pa. St. 427; *McMahon v. Sloan*, 12 Pa. St. 229; s. c. 51 Am. Dec. 601.

² *Sale by agent.* — Where the owner of a printing press and printing materials entrusted his minor son with the sale of the property, and the son sold the same during the owner's absence, and received therefor a part of the purchase price in cash, and took in his own name a chattel mortgage to secure notes given for the balance of the purchase price, and while the mortgage remained in his name, he, becoming insolvent, assigned for the

benefit of creditors, informing the assignee that the mortgage belonged to the complainant; but the assignee proceeded to foreclose the mortgage by advertisement, and the property was purchased by defendant, who was notified of complainant's claim, in a suit brought by complainant to reform the mortgage by the insertion of his name in place of that of his son, and praying for an injunction and receiver, where the evidence bears out the claim of complainant, he is entitled to the relief prayed for. *Wait v. Axford* (Mich.) 5 West. Rep. 776.

³ *A bonâ fide purchaser for value, without notice of the agency, was protected in a purchase of personal property from an agent who had been entrusted therewith to sell and account, and who had removed the property from his store to his residence, and treated it as his own; and the principal was estopped from claiming the property from the purchaser.* *Dias v. Chickering*, 64 Md. 348; s. c. 1 Cent. Rep. 479.

ment or delivery, the possessor of such documents to transfer or receive goods thereby represented.”⁴

⁴ *Nickerson v. Darrow*, 87 Mass. (5 Allen) 419, 422; *Navulshaw v. Brownrigg*, 2 De G., M. & G. (Am. ed.) 441, 445 n.; *Johnson v. The Credit Lyonnais*, L. R. 2 C. P. Div. 224; s. c. L. R. 3 C. P. Div. 32.

Factors' acts.—In many of the states and in Canada similar statutes have been passed. California, Civ. Code, 2369; Maine, Rev. Stat. 326; Maryland, Rev. Code, 291; Massachusetts, Rev. Stat. 1882, 417; New York, 3 Rev. Stat. 76; Ohio, Rev. Stat. 1880, sec. 3216, &c.; Pennsylvania, Brightly's *Purd. Dig.* 664; Rhode Island, Rev. Stat. 1882, 332; consolidated Stats. of Can. (1854) c. 54. These statutes are founded upon the English statute. *Bott v. McCoy*, 20 Ala. 578; *Michigan State Bank v. Gardner*, 82 Mass. (15 Gray) 362; *Ullman v. Barnard*, 73 Mass. (7 Gray) 554; *De Wolf v. Gardner*, 66 Mass. (12 Cush.) 19; *Jennings v. Merrill*, 20 Wend. (N. Y.) 9; *Warner v. Martin*, 52 U. S. (11 How.) 209; bk. 13, L. ed. 667; *In re Coleman*, 36 Up. Can. Q. B. 559; *Cockburn v. Sylvester*, 27 Up. Can. C. P. 34. Following *In re Coleman*, but reversed in 1 Ont. App. 471; *Todd v. Liverpool & London Globe Ins. Co.*, 20 Up. Can. P. C. 523; *Smith Merct. L.* (Am. ed.) 126 n.; 2 Kent Com. 228 n. (b).

History of the acts.—It has been said that “the English statute and our own were manifestly passed for the purpose of increasing the facilities of trade, by legalizing and explaining the case in which a party can sell, or pledge, property at sea, in a ship at dock, or lying in a warehouse subject to the payment of duties. Historically, the necessities of trade and the custom of merchants had in both cases anticipated the statutes. And the benefits of the statutes and that custom are too evident and too great to allow us to narrow the construc-

tion of the law. And there is no sound principle which would oppose a liberal view tending to enlarge the facilities of transfer; since these acts but follow out a general rule, that every man is bound to take care not to select an agent who will do acts to injure other persons.” *Cartwright v. Wilmerding*, 24 N. Y. 521, 529. The same court say in the case of *Stevens v. Wilson*, 3 Den. (N. Y.) 472; s. c. 6 Hill (N. Y.) 512, that the statute does not protect a party who deals with a factor with the knowledge that he was not the owner of the goods. *Howland v. Woodruff*, 16 Abb. (N. Y.) Pr. N. S. 411, 419; *Bates v. Cunningham*, 12 Hun (N. Y.) 21, 26; *Zachrisson v. Ahman*, 2 Sandf. (N. Y.) 68, 75; *Walther v. Wetmore*, 1 E. D. Smith (N. Y.) 7, 20. But where a factor sold and took his own check in part payment, it was held that the owner was bound, the buyer not knowing that the factor was not the rightful owner. *Traub v. Milliken*, 57 Me. 63; s. c. 2 Am. Rep. 14. In the Pennsylvania act and in many of these of the other states, it is expressly provided that a pledgee, with notice that his pledgor is not the owner, or a pledgee for an antecedent debt, takes no interest beyond that of his pledgor. See *Macky v. Dillinger*, 73 Pa. St. 85. The Texas Supreme Court have held that Galveston cotton factors have no authority except to sell for cash. *Kauffman v. Beasley*, 54 Tex. 563. Factors cannot pledge goods; and at common law a *bonâ fide* pledgee, without notice that the factor is not owner, gets no title. *Insurance Co. v. Kiger*, 103 U. S. (13 Otto) 352; bk. 26, L. ed. 433; *Gray v. Agnew*, 95 Ill. 315; *Wright v. Solomon*, 19 Cal. 64; s. c. 79 Am. Dec. 196. All consignees of goods are presumptively the owner. *McCauley v. Davidson*, 13 Minn. 162. In a case where a fac-

[And by a further Amendment Act passed in the year 1877 (40 & 41 Vict. c. 39) the effect of certain decisions which had created hardship is annulled. This Act is set out and considered, Book V. Part I. Ch. 4, *Lien*.

The majority of cases under the Factors' Acts have turned upon the meaning of the words "*agents entrusted with and in possession*."

The expression varies slightly in the different sections of the Acts, but the construction put upon it by the Courts has been virtually the same, viz., "*factor or agent entrusted as such and ordinarily having as such factor or agent a power of sale or pledge*;" per Bramwell B. in *Cole v. The North Western Bank*, L. R. 10 C. P. 375; and the definition of Willes J. in *Heyman v. Flewker*, 13 C. B. N. S. 519, at p. 527. The reader is also referred to the judgments of Willes J. in *Fuentes v. Montis*, L. R. 3 C. P. at p. 275, and of Blackburn J. in delivering the judgment of the Exchequer Chamber in *Cole v. The North Western Bank*, L. R. 10 C. P. at p. 357, where very full expositions of the law relating to the factor's power of sale and pledge will be found.⁵

§ 22. The following summary of the effect of the decisions upon *the words "agent entrusted with [*17] and in possession" will, it is hoped, be found correct and useful.

The word "*person*," in 6 Geo. IV. c. 94, s. 1, must be read

tor sold by one entire contract goods of himself and those of his principal, it was held that only the factor could sue for the price. *Roosevelt v. Doherty*, 129 Mass. 301; s. c. 37 Am. Rep. 356. A purchaser buying from a factor in belief that he is the owner, may set off a debt due him from the factor to a suit for the price by either the factor or his principal. *Merrick's Estate*, 5 Watts & S. (Pa.) 9; *Gardner v. Allen*, 6 Ala. 187; s. c. 41 Am. Dec. 45.

⁵ To come within the statute the agent must have been entrusted, by the owner, with the possession of the goods. See *Farmers & Mechanics*

Bank v. Erie R. R. Co., 72 N. Y. 188; *Kinsey v. Leggett*, 71 N. Y. 387; *Marine Bank v. Fiske*, 71 N. Y. 353; *First National Bank of Toledo v. Shaw*, 61 N. Y. 283; *Howland v. Woodruff*, 60 N. Y. 73; *Mechanics & Traders Bank v. Farmers & Mechanics Nat. Bank*, 60 N. Y. 40, 52; *Wooster v. Sherwood*, 25 N. Y. 278, 284, 287; *Covell v. Hill*, 6 N. Y. 374, 378; s. c. 4 Den. (N. Y.) 323; *Hazard v. Fiske*, 18 Hun (N. Y.) 277. A factor selling without authority must have actual possession of the goods, or he cannot convey title. *Howland v. Woodruff*, 60 N. Y. 73; *Bonito v. Moquera*, 2 Bosw. (N. Y.) 401.

as “*agent*” (Johnson *v.* Credit Lyonnais Co., 3 C. P. D. at p. 45). The “*agent*” must be an agent in a mercantile transaction (Monk *v.* Whittenbury, 2 B. & Ad. 484; Wood *v.* Rowcliffe, 6 Hare, 183). A clerk or servant is not such an agent (Lamb *v.* Attenborough, 1 B. & S. 831; Jaulerry *v.* Britten, 5 Scott, 655; s. c. 4 Bing. N. C. 242.¹ The agent must have been entrusted for the purpose of sale (Monk *v.* Whittenbury, *ubi supra*; Wood *v.* Rowcliffe, *ubi supra*), or for some object connected with the sale (Bains *v.* Swainson, 4 B. & S. 270; Vickers *v.* Hertz, L. R. 2 Sc. App. 113).² If a person carries on two businesses, one that of an agent, such as is contemplated by the Act, the other not so, and if he has been entrusted in the latter capacity, he is not an “agent entrusted” within the meaning of the Act (Monk *v.* Whittenbury, *ubi supra*; Cole *v.* North Western Bank, L. R. 9 C. P. 470; aff. in Ex. Ch. 10 C. P. 354). But if he has been entrusted as agent for sale, although it is an isolated instance of such employment, he is an “agent entrusted” within the Act (Heyman *v.* Flewker, 13 C. B. N. S. 519). To constitute an entrustment with a document of title under 6 Geo. IV. c. 94, it was held that the owner must have intended the agent to be entrusted

¹ A factor or agent cannot delegate his authority. Loomis *v.* Simpson, 13 Iowa, 532; Warner *v.* Martin, 52 U. S. (11 How.) 209, 223; bk. 13, L. ed. 667; Truman *v.* Loder, 11 Ad. & E. 589; Catlin *v.* Bell, 4 Campb. 183; Cockran *v.* Irlam, 2 Maul. & S. 301; Solly *v.* Rathbone, 2 Maul. & S. 298; 1 Parson's Contr. 71, 84.

² Sale by factors. — The relation of principal and agent must exist to render the sale valid. Stollenwerck *v.* Thatcher, 115 Mass. 224, 227; National Bank *v.* Dearborn, 115 Mass. 219; First Nat. Bank of Toledo *v.* Shaw, 61 N. Y. 299; Mechanics & Traders Bank *v.* Farmers & Mechanics Nat. Bank, 60 N. Y. 40; Collins *v.* Ralli, 20 Hun (N. Y.) 246, 251, affirmed in 85 N. Y. 637; Pease *v.* Gloahec, L. R. 1 P. C. 219, 228; Gurney *v.* Behrend, 3 El. & Bl. 622, 632. See Loomis *v.* People, 67 N. Y. 322; Smith *v.* People, 53 N. Y. 113; s. c.

13 Am. Rep. 474; Bassett *v.* Spofford, 45 N. Y. 391; s. c. 6 Am. Rep. 101; Zink *v.* People, 6 Abb. (N. Y.) N. C. 413. In a case where the plaintiff forwarded wheat to commission merchants to be shipped to Europe and sold by them to his account, and the merchants shipped the wheat in their own name, on a vessel chartered by them, of which the defendant was master, but had no notice of the plaintiff's ownership. The commission merchant becoming insolvent, broke the terms of the chartered party, by refusing to proceed with the loading. The court held that the ship owner could hold the wheat for freight and charges under his contract with the commission merchant, by force of the factors' act. Hayes *v.* Campbell, 55 Cal. 421; Green *v.* Campbell, 52 Cal. 586; Western Transportation Co. *v.* Marshall, 4 Abb. Ap. Dec. (N. Y.) 575.

with the document actually pledged. It was not sufficient that he had entrusted him with some other document of title, by means of which he had obtained possession of the document pledged (*Close v. Holmes*, 2 Moo. & Rob. 22; *Phillips v. Huth*, 6 M. & W. 572; s. c. in Ex. Ch., *sub nomine Hatfield v. Phillips*, 9 M. & W. 647; and in the House of Lords, 14 M. & W. 665; 12 Cl. & Fin. 343).³ But this has now been altered by the definition of entrustment given in 5 & 6 Vict. c. 39, s. 4.

A vendor allowed by the purchaser to retain possession of the documents of title to goods was held not to be an agent entrusted under 5 & 6 Vict. c. 39, s. 1 (*Johnson v. Credit Lyonnais Co.*, 2 C. P. D. 224; aff. on appeal, 3 C.

*P. D. 32); but this has now been altered by 40 & [*18] 41 Vict. c. 39, s. 3.⁴

A purchaser obtaining possession of the documents of title to the goods was held not to be an agent entrusted under 5 & 6 Vict. c. 39, s. 1 (*Jenkyns v. Usborne*, 7 M. & G. 678; s. c. 8 Scott, N. R. 505; *Van Casteel v. Booker*, 2 Ex. 691); but the law has now been altered by 40 and 41 Vict. c. 39, s. 4.⁵

³ *The statute applies to those cases in which the owner consents that the shipment may be made in the name of the third person. Hazard v. Fiske*, 18 Hun (N. Y.) 277.

Under the Louisiana act, possession of the goods gives the broker an apparent ownership, and he can transfer them to a *bonâ fide* pledgee for value without notice. *Henry v. Warehouse Co.*, 81 Pa. St. 76, 79. But the general rule is that a factor, as against his consignor, has no interest in the consigned property, and cannot pledge it for his own debt. See *Insurance Co. v. Kiger*, 103 U. S. (13 Otto) 352; bk. 26, L. ed. 433. See, also, *Lobdell v. Baker*, 42 Mass. (1 Metc.) 193, 202; s. c. 35 Am. Dec. 358; *Folsom v. Batchelder*, 22 N. H. (2 Fost.) 47, 51; *Crocker v. Crocker*, 31 N. Y. 507; *Wooster v. Sherwood*, 25 N. Y. 278, 284; *Brower v. Peabody*, 13 N.

Y. 121; *Western Transportation Co. v. Marshall*, 37 Barb. (N. Y.) 509, 515; *Saltus v. Everett*, 20 Wend. (N. Y.) 267; s. c. 32 Am. Dec. 541; *Pickering v. Busk*, 15 East, 43.

⁴ *Hazard v. Fiske*, 18 Hun (N. Y.) 277.

⁵ Where one obtains possession of goods, under an agreement that the title shall not pass until the price is paid, and afterwards sells them to a *bonâ fide* purchaser, such purchaser will obtain a good title under the factors' act. *Western Union R. R. Co. v. Wagner*, 65 Ill. 197; *Michigan Central R. R. Co. v. Phillips*, 60 Ill. 190; *Ohio & M. R. R. Co. v. Kerr*, 49 Ill. 459; *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Butters v. Haughwout*, 42 Ill. 18; *Brundage v. Camp*, 21 Ill. 330; *Jennings v. Gage*, 13 Ill. 611; s. c. 56 Am. Dec. 476; *Smith v. Lynes*, 5 N. Y. 42; *Rawls v. Deshler*,

Again, under 5 & 6 Vict. c. 39, it was held that the agent must have been actually entrusted at the time of the pledge, and if the entrustment had been withdrawn, no matter though secretly and though possession remained, yet the pledgee was not protected (*Fuentes v. Montis*, L. R. 3 C. P. 268). But this has now been altered by 40 & 41 Vict. c. 39, s. 2.⁶

Finally, if the owner really entrusts the agent with the document of title, it is immaterial, so far as the safety of the purchaser or pledgee is concerned, that the entrustment was obtained in consequence of the agent's false and fraudulent representations to the owner (*Sheppard v. Union Bank of London*, 7 H. & N. 661). But this case must be carefully distinguished from cases where there is no real *entrustment as agent of the owner*, but the *possession* only of the document has been obtained by fraud. In such case the person obtaining possession has no title at all, either as principal or agent, and can convey none to any one else (*Kingsford v. Merry*, 11 Ex. 577; 1 H. & N. 503; *Higgins v. Burton*, 26 L. J. Ex. 342).⁷]

4 Abb. Ap. Dec. (N. Y.) 12, 16; *Hollingsworth v. Napier*, 3 Cai. (N. Y.) 182; *Buck v. Grimshaw*, 1 Edw. Ch. (N. Y.) 146; *Bates v. Cunningham*, 12 Hun (N. Y.) 21; *Haggerty v. Palmer*, 6 Johns. Ch. (N. Y.) 437; *Keeler v. Field*, 1 Paige Ch. (N. Y.) 312; *Rose v. Story*, 1 Pa. St. 190; s. c. 44 Am. Dec. 121; *Martin v. Mathiot*, 14 Serg. & R. (Pa.) 214; s. c. 16 Am. Dec. 491; *Lickbarrow v. Mason*, 2 T. R. 63. *Contra*: *Sawyer v. Fisher*, 32 Me. 28; *Tibbetts v. Towle*, 12 Me. 341; *Benner v. Puffer*, 114 Mass. 376; *Hirschorn v. Canney*, 98 Mass. 149; *Deshon v. Bigelow*, 74 Mass. (8 Gray) 159; *Coggill v. Hartford & N. H. R. R. Co.*, 69 Mass. (3 Gray) 545; *Sargent v. Gile*, 8 N. H. 325.

⁶ *Where a commission merchant, who sells and delivers property entrusted to him for sale, before notice of the revocation of his authority, the purchaser, under such sale thereby acquires a good title, as against a prior purchaser, from the consignor*

without delivery. *Jones v. Hodgkins*, 61 Me. 480; *Harper v. Little*, 2 Me. (2 Greenl.) 18; s. c. 11 Am. Dec. 25. However, see *Spring v. Coffin*, 10 Mass. 31.

⁷ *Possession obtained by fraud.*—Property in things movable can only pass from the owner by his own act and consent, except in those cases where the owner has, by his direct and voluntary act, conferred upon the person from the *bonâ fide* vendee, and obtains title, the apparent right of property as owner, or of disposal as agent. *Brower v. Peabody*, 13 N. Y. 121, 126; *Saltus v. Everett*, 20 Wend. (N. Y.) 267; s. c. 32 Am. Dec. 541. Hence where property is contracted for cash on delivery, and there is no modification of the contract in this particular, and the purchaser obtains possession of the property purchased, without the vendor's knowledge, or consent, and without paying therefor, and sells and delivers it to a third person, such third person thereby

§ 23. These acts apply solely to persons entrusted as factors or commission merchants, not to persons to whose employment a power of sale is not ordinarily incident, as a wharfinger who receives goods usually without power to sell.¹ The statute is limited in its scope to mercantile transactions, to dealings in goods and merchandise, and does not embrace sales of furniture or goods in possession of a tenant or bailee for hire. A purchaser in good faith from such vendors would be liable to trover to the true *owner.² [*19] Mr. Chitty, in his "Treatise on Contracts"³ has the following passage:— "It is said, however, that if the real owner of goods suffer another to have possession thereof, or of these documents which are the indicia of property therein, — thereby enabling him to hold himself forth to the world as having not the possession only, but the property, — a sale⁴ by such person to a purchaser without notice will bind the true owner (*per* Abbott, C. J., *Dyer v. Pearson*, 3 B.

acquires no title. *Brower v. Peabody*, 13 N. Y. 121. In *Barker v. Dinsmore*, 72 Pa. St. 427; s. c. 13 Am. Rep. 697, a man representing himself to be connected with a well-known firm, contracted for goods to be consigned to the firm at Pittsburg, and paid for there, and by this means got possession of the goods, not upon his own individual responsibility, but on that of such firm, and afterwards sold them. The Supreme Court of Pennsylvania held that no title passed to the purchaser.

See, also, *Dows v. Greene*, 24 N. Y. 638; *Dows v. Perrin*, 16 N. Y. 325; *Western Transportation Co. v. Marshall*, 4 Abb. Ap. Dec. 575, affirming 37 Barb. (N. Y.) 509; *Mowrey v. Walsh*, 8 Cow. (N. Y.) 238; *Root v. French*, 13 Wend. (N. Y.) 570; s. c. 28 Am. Dec. 428.

¹ *Monks v. Wittenbury*, 2 B. & Ad. 484.

American authorities. — *Quinn v. Davis*, 78 Pa. St. 15; *Kusenbergh v. Brown*, 42 Pa. St. 173; *McMahon v. Sloan*, 12 Pa. St. 229; s. c. 51 Am. Dec. 601; *Lecky v. McDermott*, 8

Serg. & R. (Pa.) 500; *Rapp v. Palmer*, 3 Watts (Pa.) 178; *Dows v. National Exchange Bank*, 91 U. S. (1 Otto) 618; bk. 23, L. ed. 214.

² *Loeschman v. Machin*, 2 Stark. 311; *Cooper v. Willomat*, 1 C. B. 672.

American authorities. — *Marshall v. Beeber*, 53 Ind. 83; *Prime v. Cobb*, 63 Me. 200; *Galvin v. Bacon*, 11 Me. (2 Fairf.) 28; *Bearce v. Bowker*, 115 Mass. 129, 132; *Gilmore v. Newton*, 91 Mass. (9 Allen) 171; *Stanley v. Gaylord*, 55 Mass. (1 Cush.) 536; s. c. 48 Am. Dec. 643; *Porter v. Parks*, 49 N. Y. 564; *Barker v. Dinsmore*, 72 Pa. St. 427; *Cooper v. Willomat*, 1 C. B. 672; *Loeschman v. Machin*, 2 Stark. 311.

³ Page 302, 11th ed. 1881.

⁴ Where the owner of a horse placed him for sale in the hands of a commission merchant, who exchanged the horse for another and \$25, it was held that his authority was terminated by this transaction, and that the principal was not liable for subsequent transactions and the board of horses in trade. *Wing v. Neal* (Me. Jan. 20, 1886), 1 New Eng. Rep. 665.

& C. 38; *per* Bayley, J., *Boyson v. Coles*, 6 M. & S. 14).⁵ But probably this proposition ought to be limited to cases where

⁵ *Person trusted with possession by owner.* — In a case where the plaintiff employed one M. to purchase a horse for him, and M. bought the horse, paid for it with plaintiff's money, and took a bill of sale in his own name, and afterwards informed the plaintiff of what he had done, and showed him the bill of sale; but the plaintiff permitted him to go away with the horse and bill of sale still in his possession. M. thereupon went to the defendant, who had no knowledge of the agency, showed him the bill of sale, sold him the horse for cash, and absconded. The court held that the plaintiff could not recover in an action of trover for the horse. *Nixon v. Brown*, 57 N. H. 34; s. c. 4 Am. L. Times Rep. N. S. 187.

The court say in this case that it is a general rule that possession of goods by a bailee or servant, gives him no power to make any disposition of them, except by virtue of actual authority received from the owner (*Folsom v. Batchelder*, 22 N. H. 51) and is so well settled as to be quite elementary; but there are several exceptions to this rule quite as well settled and quite as well understood, as the rule itself; among which exceptions, they say, is where the owner has allowed the bailee in possession to hold out appearance of an authority to sell, which would deceive and defraud the fair purchaser, if the law allowed the validity of the sale to be questioned. *Western Union R. R. Co. v. Wagner*, 65 Ill. 197; *Michigan Cent. R. R. Co. v. Phillips*, 60 Ill. 190, *Western Transportation Co. v. Marshall*, 4 Abb. App. Dec. (N. Y.) 575; affirming s. c. 37 Barb. (N. Y.) 509; *Pickering v. Busk*, 15 East, 41; *Hartop v. Hoare*, 1 Wils. 8; s. c. 2 Strange, 1187; 3 Atk. 44. It is a maxim alike in the civil and common law that *nemo plus juris in alium transferre potest quam*

ipse habet. 2 Kent Com. 824. Judge Rapallo says in *McNeil v. Tenth National Bank*, 46 N. Y. 325; s. c. 7 Am. Rep. 341, that "it is a well established principle that where the true owner holds out another, or allows him to appear as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected; their rights in such case do not depend upon the actual title or authority of the party with whom they deal, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance," citing *Pickering v. Busk*, 15 East, 38; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41; s. c. 14 Am. Rep. 173; *Mowrey v. Walsh*, 8 Cow. (N. Y.) 238; *Saltus v. Everett*, 20 Wend. (N. Y.) 267, 284; s. c. 32 Am. Dec. 541; *Root v. French*, 13 Wend. (N. Y.) 570; s. c. 28 Am. Dec. 428; *Gregg v. Wells*, 10 Ad. & E. 90. In the case of *Pickering v. Busk*, 15 East, 38, which is the leading case on the subject, Swallow, a broker, had purchased from the plaintiff (*Pickering*) a quantity of hemp which by the plaintiff's desire was delivered to Swallow, by a transfer to him on the books of the wharfinger; shortly after, another load of hemp was purchased by Swallow, which was transferred to the name of *Pickering* or *Swallow*, which the court held to be the same as if it had been transferred to the name of *Swallow*, the plaintiff paid for the hemp. Swallow afterwards sold the hemp to *Hayward & Co.*, who paid for it; the plaintiff sued the assignee in bankruptcy of *Hayward & Co.* in trover, for the hemp; and

the person who had the possession of the goods was one who from the nature of his employment might be taken *primâ facie* to have had the right to sell.”⁶ This limitation suggested by Mr. Chitty to the rule propounded in the *dicta* of the two learned judges was approved by the Barons of the Exchequer in *Higgins v. Burton*,⁷ and when thus limited, the principle does not differ substantially from the provisions of the Factors’ Act, as amended by the 5 & 6 Vict. c. 39.

the court held that the plaintiff having given to Swallow all the *indicia*, could not afterwards be permitted to say that Swallow had no authority to sell the hemp. See generally, *Mechanics’ & Traders’ Bank v. Farmers’ & Mechanics’ Bank*, 60 N. Y. 40; *Porter v. Parks*, 49 N. Y. 564; *Rawls v. Deshler*, 4 Abb. App. Dec. (N. Y.) 12; *Quinn v. Davis*, 78 Pa. St. 15; *McMahon v. Sloan*, 12 Pa. St. 229; s. c. 51 Am. Dec. 601.

⁶ *The doctrine of estoppel* governs this principle. See *Barnard v. Campbell*, 55 N. Y. 456; *McNeil v. Tenth National Bank*, 46 N. Y. 325; s. c. 7 Am. Rep. 341; *Nixon v. Brown*, 57 N. H. 34, 39. In *Nixon v. Brown*, it is said that the principle is quite elementary “that where one of two innocent parties must suffer by the fraud of a third person, he who has trusted such third person and enabled him to deceive the other, cannot abate the consequences of the fraud, however innocent he may be in other respects.” Story on Agency, sec. 127. In *Barnard v. Campbell*, *supra*, the court say that “two things must concur to create an estoppel by which an owner may be deprived of his property by the act of a third person, without his assent, under the rule now considered: first, the owner must clothe the person assuming to dispose of the property with the apparent title to, or authority to dispose of it; and second, the person alleging the estoppel must have sold and parted with value on the faith of such apparent ownership. In this respect it

does not differ from other estoppels *in pais*.”

But in order to create an estoppel, the owner must have enabled the wrong-doer to perpetrate the fraud. *Marine Bank of Buffalo v. Fiske*, 71 N. Y. 353. For the owner cannot be divested of his property, except by his own voluntary act and consent, or by some act which would be effectual in giving title as against him; *Weaver v. Barden*, 49 N. Y. 286; *City Bank of Rochester v. Jones*, 4 N. Y. 497; s. c. 55 Am. Dec. 290; *Brower v. Peabody*, 13 N. Y. 121; *Covill v. Hill*, 4 Den. (N. Y.) 323; *Prescott v. De Forest*, 16 Johns. (N. Y.) 159; *Wheelwright v. Depeyster*, 1 Johns. (N. Y.) 471; s. c. 3 Am. Dec. 345; *Williams v. Merle*, 11 Wend. (N. Y.) 80; s. c. 25 Am. Dec. 604; *Dows v. National Exchange Bank of Milwaukee*, 91 U. S. (1 Otto) 618; bk. 23, L. ed. 214; *Jenkyns v. Brown*, 14 Q. B. 496; because it is well settled that no person can transfer the title to another’s property, unless such other has qualified him with authority, real or apparent, to do so, that is has given him authority to act as agent or as owner. *McGoldrick v. Willits*, 52 N. Y. 612, 617; *Ballard v. Burgett*, 40 N. Y. 314. See also *Jones v. Hodgkins*, 61 Me. 480. But compare *Bohn v. Cleaver*, 25 La. An. 419.

⁷ 26 L. J. Ex. 342. See, also, *Pickering v. Busk*, 15 East, 38; *Cole v. North Western Bank*, L. R. 9 C. P. 470; affirmed in Ex. Ch. 10 C. P. 354; and *per Cockburn C. J.* in

§ 24. But the cases decided under the Factors' Acts leave this statement open to grave doubt, and show the extreme difficulty of defining the subject-matter to which it applies.

In *Heyman v. Flewker*,¹ a picture dealer was held to be an "agent" entrusted with the goods under the Act, whose ordinary business was not to sell pictures, but who was authorized to sell the particular pictures in controversy, and instead of so doing pledged them.

In *Baines v. Swainson*,² the circumstances were that one Emsley, who carried on business at Leeds as factor and commission merchant, falsely represented to the plaintiffs that he could sell some of their goods to one Sykes. The [*20] *plaintiffs thereupon sent to the premises of Emsley the goods, to be by him "perched," or stretched on poles, so that the purchaser could examine them, and then to deliver them. The goods were sent in several successive lots. Emsley sold them to the defendant at a less price than he represented he could get from Sykes. The plaintiffs brought trover, and Martin B. directed the jury to give

Johnson v. Credit Lyonnais, 3 C. P. D. at p. 39.

American authorities. — *Labdell v. Baker*, 42 Mass. (1 Metc.) 202, 203; *Folsom v. Batchelder*, 22 N. H. 51; *Crocker v. Crocker*, 31 N. Y. 507; *Wooster v. Sherwood*, 25 N. Y. 278; *Saltus v. Everett*, 20 Wend. (N. Y.) 267.

¹ 13 C. B. N. S. 519; 32 L. J. C. P. 132.

² 4 B. & S. 270; 35 L. J. Q. B. 281.

A sale and delivery procured by fraud passes no title as between the parties. *Thompson v. Rose*, 16 Conn. 71; *Landauer v. Cochran*, 54 Ga. 533; *Patton v. Campbell*, 70 Ill. 72; *Kline v. Baker*, 99 Mass. 253; *Fox v. Webster*, 46 Mo. 181; *Stewart v. Emerson*, 52 N. H. 301; *Hennequin v. Naylor*, 24 N. Y. 139; *Tamplin v. Addy*, 8 Cow. (N. Y.) 239; *Woodworth v. Kissam*, 15 Johns. (N. Y.) 186; *Van Cleef v. Fleet*, 15 Johns. (N. Y.) 147; *Lloyd v. Brewster*, 4 Paige Ch. (N. Y.) 537; *Lupin v. Marie*, 2 Paige

Ch. (N. Y.) 169; *Andrew v. Dietrich*, 14 Wend. (N. Y.) 31; *Root v. French*, 13 Wend. (N. Y.) 570; *Tilton Safe Co. v. Tisdale*, 48 Vt. 83; *Hodgeden v. Hubbard*, 18 Vt. 504; *Donaldson v. Farwell*, 93 U. S. (3 Otto) 631; bk. 23, L. ed. 993; *Johnson v. Peck*, 1 Woodb. & M. C. C. 334. But a subsequent *bonâ fide* purchaser will be protected. *Jennings v. Gage*, 13 Ill. 610; *Ditson v. Randall*, 33 Me. 202; *Hall v. Hinks*, 21 Md. 406; *Hoffman v. Noble*, 47 Mass. (6 Metc.) 68; *Barnard v. Campbell*, 58 N. Y. 73; s. c. 17 Am. Rep. 208; 55 N. Y. 456; 14 Am. Rep. 289; *Crocker v. Crocker*, 31 N. Y. 507; *Mowrey v. Walsh*, 8 Cow. (N. Y.) 238; *Shearer v. Barrett*, Hill & D. (N. Y.) 70; *Saltus v. Everett*, 20 Wend. (N. Y.) 267; *Root v. French*, 13 Wend. (N. Y.) 572; *Sinclair v. Healy*, 40 Pa. St. 417; *Thompson v. Lee*, 3 Watts & S. (Pa.) 479; *Arendale v. Morgan*, 5 Sneed (Tenn.), 703; *Williams v. Given*, 6 Gratt. (Va.) 268.

them a verdict. The Queen's Bench directed a new trial, Wightman and Crompton JJ. holding Emsley to be an agent within the meaning of the Act, and Blackburn J. thinking that at all events there was a case for the jury to determine that fact, and also to decide whether the sale had taken place in the ordinary course of business. Crompton and Blackburn JJ. were of opinion that the agencies referred to by the Act are such as are mercantile only, and of persons who, as mercantile agents, would have to make sales in the ordinary course of business, as had previously been held by Vice-Chancellor Wigram, in *Wood v. Rowcliffe*.³ Crompton J. said it was impossible to define what was meant, and "it is one of those loose enactments which conveys much difficulty. When you get to these Acts of Parliament the difficulty is immense."

§ 25. In *Fuentes v. Montis*,¹ the Court of Common Pleas gave judgment (affirmed in Ex. Ch.) in favor of the plaintiffs, wine merchants, in Spain, for certain casks of sherry, which they had consigned for sale to a London factor, who had pledged them as security for advances made by the defendant after revocation of the factor's authority, although the defendant was in good faith, and ignorant of the revocation, and although the wine remained in the factor's possession; the Court holding that the words "entrusted with and in possession of," must be construed as referring to the time when the factor made the pledge, and that he was no longer "entrusted with" the goods after he had been ordered to deliver them to another factor for account of the consignor, *although he had disobeyed the order, [*21] and remained "in possession."

Under this decision, which the judges, Willes, Keating, and Smith, expressed regret at being constrained to deliver, the confidence felt by merchants in dealing with factors in relation to goods consigned to them, and in their possession, must be greatly shaken; and there seems certainly to be no

³ 6 Hare, 183.

¹ L. R. 3 C. P. 268; 37 L. J. C. P. 137; L. R. 4 C. P. 93. See also *Sheppard v. The Union Bank of London*, 7 H. & N. 661; 31 L. J. Ex. 154.

mode of *making advances* safely to a factor on the security of goods on consignment, for a merchant or banker in London or Liverpool has no means of finding out whether the foreign consignor has or has not revoked the factor's authority. In this case also Willes J. expressed his entire concurrence in the following *dictum* of Blackburn J. reported in *Baines v. Swainson*: "I do not agree with the counsel for the defendant, that the mere fact of an agent being found in possession of goods, although they have been handed to him by the owner knowing that he carries on such a business, amounts to an 'entrusting' him as agent; though I think that under that part of section 4 of statute 5 & 6 Vict. c. 39, to which I have referred, the fact of a person being put in possession of goods, calls upon the person who gave him possession to explain and show that it was not an entrusting." It would seem to result from this that a *purchaser*, even from a factor, would get no title to goods if the consignor could show that he had sent them to the factor merely to be kept in storage, or to be forwarded to another place, although the factor was in possession of them with the consent of the consignor, and was a person whose ordinary business consisted in selling goods sent to him on consignment.

[The law has now been altered as to secret revocations of entrustment by 40 & 41 Vict. c. 39, s. 2.]

Although this case was affirmed in the Ex. Ch., the *dicta* that the Act has reference only to factors *for sale* of the goods are disapproved by Lord Westbury in *Vickers v. Hertz*,² *so that no one would venture, in the

² L. R. 2 Sc. App. 113, 118; but see remarks of Blackburn J. in *Cole v. North Western Bank*, L. R. 10 C. P. at p. 374, where he shows that Willes J. in *Fuentes v. Montis*, L. R. 3 C. P. at p. 284, did not express an opinion that the Act only applied to factors for *future sale*. Mr. Justice Willes says expressly in that case, at p. 279, "I do not mean to limit the operation of the statute to agents entrusted with goods for future sale, either generally or in the particular instance;" and he then goes on to

refer, with approval, to *Baines v. Swainson*, 4 B. & S. 270, the facts in which bear a striking resemblance to those in *Vickers v. Hertz*.

Construction of act.—In *Cole v. North Western Bank*, L. R. 10 C. P. 374. Blackburn J. says that Willes J. in *Fuentes v. Montis*, L. R. 3 C. P. 268, did not express an opinion that the act only applied to factors for future sale. In that case Mr. Justice Willes expressly says at p. 279, "I do not mean to limit the operation of the statute to agents entrusted with

present state of the authorities, to give a positive opinion as to the true construction of this statute. The subject is further discussed *post*, Book V. Part I, Ch. IV., on Lien.

Section II. — WHO MAY BUY.

§ 26. There are certain classes of persons incompetent to contract in general, but who under special circumstances may make valid purchases. Infants, insane persons, and married women, are usually protected from liability on contracts, as also drunkards when in such a state as to be unable to understand what they are doing; such persons being considered to be devoid of that freedom of will combined with that degree of reason and judgment, that can alone enable them to give the *assent* which is necessary to constitute a valid engagement. The exceptions to this general disability, so far as concerns the competency to purchase, will now be considered.¹

goods for future sale, either generally or in the particular instance." He then refers, with approval, to *Baines v. Swainson*, 4 B. & S. 270. The facts in the latter case bear a striking resemblance to those in *Vickers v. Hertz*.

¹ *Who may not buy.*—It is a well-settled doctrine that trustees cannot buy, take, or sell the property of their *cestui que trusts*, "though any person can become a purchaser of goods necessary in property, where he has a duty to perform which is inconsistent with the character of the purchaser." *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252. The rule refers to agents, public or private, and embraces every relation in which there may arise a conflict between the duty which the vendor or purchaser owes to the person with whom he is dealing, or on whose account he is acting, and his own individual necessities. *Michoud v. Girond*, 45 U. S. (4 How.) 503, 555, 559; bk. 11, L. ed. 1076, 1099, 1101. The court

say in this case that "if persons having a confidential character were permitted to avail themselves of any knowledge acquired in that capacity, they might be induced to conceal their information, and not to exercise it for the benefit of the persons relying upon their integrity. The characters are inconsistent. *Emptor emit quam minimo potest, venditor vendit quam maximo potest.*" The prohibition to purchase is not confined to those who were formerly active in effecting a sale; it extends to all upon whom the act of the party or of the law gives a fiduciary relation to the subject of the trust, and which they are not permitted to shake off at pleasure. *Beeson v. Beeson*, 9 Pa. St. (9 Barr.) 279, 284. This prohibition to purchase extends to agents, guardians, executors, administrators, attorneys, sheriffs, assignees, and the directors of corporations.

1. *Trustees.*—*Kellick v. Flexney*, 4 Bro. C. C. 161; *Hall v. Noyes*, 3 Bro. C. C. 483; *Fox v. Mackreth*, 2

§ 27. *Infants*, that is, persons under the age of twenty-one years, are protected by law from liability on purchases made by them, unless for *necessaries*.

The purchase by an infant, however, is not absolutely void, but only voidable in his favor.¹ He may maintain an

Bro. C. C. 400; s. c. 4 Bro. C. C. (Tomlins') 258; Whitackre v. Whitackre, Sel. Chan. Cases, 13; Hall v. Noyes, 3 Ves. 748; Whichcote v. Lawrence, 3 Ves. 740; Campbell v. Walker, 5 Ves. 678.

Agents.—York Buildings Co. v. Mackenzie, 8 Bro. P. C. 42; Woodhouse v. Meredith, 1 Jac. & Walk. 204; Whitcomb v. Minchin, 5 Madd. 91; Watt v. Grove, 2 Sch. & Lef. 492; Lowther v. Lowther, 13 Ves. 95.

Commissioners of bankrupts.—Ex parte Bennett, 10 Ves. 381; Ex parte Harrison, 1 Buck. 17; Ex parte Dumbell, 2 Glyn. & J. 121, Mort. notes 33, cited.

Assignees of bankrupts.—Ex parte Bage, 4 Madd. 459; Ex parte Badcock, 1 Mont. & Mac. 231; Ex parte Lacey, 6 Ves. 625; Ex parte Reynolds, 5 Ves. 707.

Solicitors to the commission.—Ex parte Dumbell, 2 Glyn. & J. 121, Mort. notes, cited; 3 Mer. 200; see 12 Ves. 372; Ex parte Bennett, 10 Ves. 381; Ex parte Churchill, cited in 8 Ves. 343; Owen v. Foulkes, 6 Ves. 630, note b; Ex parte Linwood, cited in 8 Ves. 343.

Auctioneers.—Oliver v. Court, 8 Price, 127; Coles v. Trecothick, 1 Smith's Rep. 233; s. c. 9 Ves. 234; Ex parte Hughes, 6 Ves. 617.

See 1 White & P. Lead. Cas. in Eq. (Ed. 1876), 62, 238; 2 White & P. Lead. Cas. in Eq. (Ed. 1228). An agent or trustee cannot directly, or indirectly, become a purchaser of property confined to his care. Bank of Orleans v. Torrey, 7 Hill (N. Y.) 260; s. c. 9 Paige (N. Y.) 649; Dobson v. Racey, 3 Sandf. Ch. (N. Y.) 60; Church v. Mar. Ins. Co., 1 Mason

C. C. 341; Baker v. Whiting, 3 Sumn. C. C. 476.

And a purchase by an agent is in equity a purchase for the principal. Baker v. Whiting, 3 Sumn. C. C. 475. An agent employed to purchase for another cannot purchase for himself. Church v. Sterling, 16 Conn. 388; Johnson v. Blackman, 11 Conn. 342; Banks v. Judah, 8 Conn. 145; Beal v. McKiernan, 6 La. 407; Safford v. Hynds, 39 Barb. (N. Y.) 625; Parkist v. Alexander, 2 John. Ch. (N. Y.) 394; Tear v. Matthews, Wright (Ohio) 371; Bartholemew v. Leach, 7 Watts (Pa.) 472; Taylor v. Salmon, 4 Myl. & Cr. 139; Massey v. Davies, 2 Ves. Jr. 317; East I. Co. v. Henchman, 1 Ves. Jr. 289. And an agent employed to sell cannot buy the property in question. McDonald v. Lord, 2 Robt. (N. Y.) 7. A trustee is disqualified from purchasing an interest adverse to that of his *cestui que trust* in the trust property. Michoud v. Girod, 45 U. S. (4 How.) 503; bk. 11, L. ed. 1077; Walden v. Bodley, 39 U. S. (14 Pet.) 156; bk. 10, L. ed. 398; Sloo v. Law, 3 Blatchf. C. C. 459; Lenox v. Notrebe, Hempst. C. C. 251; Prevost v. Gratz, Pet. C. C. 364; Matter of Thorp, 2 Ware (Dav.) C. C. 290.

¹ Gibbs v. Merrell, 3 Taunt. 307; Hunt v. Massey, 5 B. & Ad. 902; Holt v. Clarencieux, 2 Str. 988; Zouch v. Parsons, 3 Burr. 1794; per Abbott C. J. in The King v. Inhabitants of Chillesford, 4 B. & C. at p. 100.

Chandler v. Simmons, 97 Mass. 512; Adelpia Loan Association v. Fairhurst, 9 Ex. 422, 430.

Purchase by infant.—If an infant lives with his parents, who provide for him everything which in their

judgment appears to be proper, the infant cannot bind himself for such articles as might under other circumstances be deemed necessary. *Bainbridge v. Pickering*, 2 Wm. Bl. 1325; *Cook v. Deaton*, 3 Carr. & P. 114; s. c. 14 Eng. C. L. 232; *Barrensdale v. Greville*, 1 Selw. N. P. 127.

If he lives apart from his parents, laboring and receiving the profits of his labor to his own use, he is *pro tempore* acting as his own man by the assent of his parents, and will be liable for necessities suitable to his condition. *Guthrie v. Morris*, 22 Ark. 411; *Cantine v. Phillips*, 5 Harr. (Del.) 428; *Price v. Sanders*, 60 Ind. 310; *Stone v. Denison*, 30 Mass. (13 Pick.) 1; s. c. 23 Am. Dec. 654; *Conn v. Coburn*, 7 N. H. 368; s. c. 26 Am. Dec. 746; *Randall v. Sweet*, 1 Den. (N. Y.) 460; *Smith v. Young*, 2 Dev. & Bat. (N. C.) 26; *Hyman v. Cain*, 3 Jones (N. C.) L. 111; *Haine v. Tarrant*, 2 Hill (S. C.) L. 100 and *400; *Dubose v. Wheddon*, 4 McC. (S. C.) L. 221; *McMinn v. Richmonds*, 6 Yerg. (Tenn.) 9; *Maddox v. Miller*, 1 Maule & S. 738. *Contra*, *Maples v. Wightman*, 4 Conn. 376; *Alsop v. Todd*, 2 Root (Conn.) 105; *Martin v. Mayo*, 10 Mass. 137; s. c. 6 Am. Dec. 103; *Hussey v. Jewett*, 9 Mass. 100; *Smith v. Mayo*, 9 Mass. 62; s. c. 6 Am. Dec. 28; *Van Winkle v. Ketchum*, 3 Cai. (N. Y.) 323; *Swasey v. Adm'r of Vanderheyden*, 10 Johns. (N. Y.) 34; *Wailing v. Toll*, 9 Johns. (N. Y.) 141; *Williamson v. Watts*, 1 Campb. N. P. 552. But the amount covered will not necessarily be the price agreed upon, but only the reasonable value of the articles furnished. *Guthrie v. Morris*, 22 Ark. 411; *Morton v. Steward*, 5 Ill. App. 533; *Earle v. Reed*, 51 Mass. (10 Metc.) 387; *Rainwater v. Durham*, 2 Nott & McC. (S. C.) 524; s. c. 10 Am. Dec. 637. Whether the articles furnished are of the class for which an infant is liable, is a matter of law; whether they were actually necessities, and the price reasonable, is a

matter of fact for the jury. *Stanton v. Willson*, 3 Day (Conn.) 37; s. c. 3 Am. Dec. 255; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Davis v. Caldwell*, 66 Mass. (12 Cush.) 514; *Swift v. Bennett*, 64 Mass. (10 Cush.) 436; s. c. 26 Am. Dec. 746; *Smith v. Young*, 2 Dev. & Bat. (N. C.) 26; *Mohney v. Evans*, 51 Pa. St. 80; *Glover v. Ott*, 1 McC. (S. C.) 572; *Bent v. Manning*, 10 Vt. 225; *Warton v. Mackenzie*, 5 Q. B. 606; *Mackarell v. Bachelor*, Cro. Eliz. 583; *Stone v. Withypoll's Case*, 1 Leon. 114; *Peters v. Fleming*, 6 Mees. & W. 42; *Cheve v. Chester*, Palmer, 361; *Jene v. Chester*, Popham, 151; *Hands v. Slaney*, 8 T. R. 578. In clear cases the court may authoritatively direct as a matter of law, when the infant is not primarily liable. This has frequently been done where the purchase was made for business purposes and not for necessities. See *McKanna v. Merry*, 61 Ill. 177; *Price v. Sanders*, 60 Ind. 311; *Beeler v. Young*, 1 Bibb (Ky.) 520; *Smithpeters v. Griffin*, 10 B. Mon. (Ky.) 259; *McCarty v. Henderson*, 138 Mass. 310; *Wallis v. Bardwell*, 126 Mass. 366; *Merriam v. Cunningham*, 65 Mass. (11 Cush.) 40; *Mason v. Wright*, 54 Mass. (13 Metc.) 306; *Tupper v. Cadwell*, 53 Mass. (12 Metc.) 559; s. c. 46 Am. Dec. 704; *Decell v. Lewenthal*, 57 Miss. 331; s. c. 34 Am. Rep. 449; *Freeman v. Bridger*, 4 Jones (N. C.) L. 1; s. c. 67 Am. Dec. 258; *New Hampshire Mut. Fire Ins. Co. v. Noyes*, 32 N. H. 345; *Phelps v. Worcester*, 11 N. H. 51; *Mohney v. Evans*, 51 Pa. St. 80; *West v. Greg*, 1 Grant (Pa.) 53; *Hughes v. Gallans*, 10 Phila. (Pa.) 618; *Count v. Bates*, Harp. (S. C.) 464; *Rainwater v. Durham*, 2 Nott & McC. (S. C.) 524; s. c. 10 Am. Dec. 637; *Grace v. Hale*, 2 Humph. (Tenn.) 27; s. c. 36 Am. Dec. 296; *Middlebury College v. Chandler*, 16 Vt. 686. But see *Epperson v. Nugent*, 57 Miss. 45.

Necessaries for infants are all things which are adapted to his personal

wants, and the jury find to have been suitable in kind, quality, and degree. *Barnes v. Barnes*, 50 Conn. 572; *Jordan v. Coffield*, 70 N. C. 110; *Peters v. Fleming*, 6 Mees. & W. 46. Thus recovery has been had for —

1. Attorneys' services. *Munson v. Washband*, 31 Conn. 303; *Barker v. Hibbard*, 54 N. H. 539; s. c. 20 Am. Rep. 160; *Thrall v. Wright*, 38 Vt. 494; *Brown v. Ackroyd*, 34 Eng. L. & Eq. 214. But see *New Hampshire Mutual Ins. Co. v. Noyes*, 32 N. H. 345, 351; *Phelps v. Worcester*, 11 N. H. 51; *McCrillis v. Bartlett*, 8 N. H. 569.

2. For dental services. *Strong v. Foote*, 42 Conn. 203.

3. For money paid on request to a third person for necessities furnished. *Swift v. Bennett*, 64 Mass. (10 Cush.) 436; s. c. 26 Am. Dec. 746; *Conn v. Coburn*, 7 N. H. 368; s. c. 26 Am. Dec. 746; *Randall v. Sweet*, 1 Den. (N. Y.) 460. See *Clarke v. Leslie*, 5 Esp. 28; *Probart v. Knouth*, 2 Esp. 472; *Ellis v. Ellis*, 12 Mod. 197; *Earle v. Peale*, 1 Salk. 386; s. c. 10 Mod. 67; *Marlow v. Pitfield*, 1 P. Wm. 558.

4. For wedding outfits. *Sams v. Stockton*, 14 B. Mon. (Ky.) 232; *Jordan v. Coffield*, 70 N. C. 110.

5. For necessities supplied to infant's wife. *Cantine v. Phillips*, 5 Harr. (Del.) 428; *Price v. Sanders*, 60 Ind. 311. Citing *Stanton v. Willson*, 3 Day (Conn.) 37; s. c. 3 Am. Dec. 255; *Carpenter v. Carpenter*, 45 Ind. 142; *Grossman v. Lauber*, 29 Ind. 618; *Dorrell v. Hastings*, 28 Ind. 478; *Pickler v. Slate*, 18 Ind. 266; *Henderson v. Fox*, 5 Ind. 489; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Smith v. Kelley*, 54 Mass. (13 Metc.) 309; *Mason v. Wright*, 54 Mass. (13 Metc.) 306; *New Hampshire Mutual Ins. Co. v. Noyes*, 32 N. H. 345; *Phelps v. Worcester*, 11 N. H. 51; *Cunningham v. Irwin*, 7 Serg. & R. (Pa.) 247; s. c. 10 Am. Dec. 458; *Haine v. Tarrant*, 2 Hill (S. C.) L. 100 and *400; *Glover v. Ott*, 1 McC. (S. C.) 351, *571;

Grace v. Hale, 2 Humph. (Tenn.) 27; s. c. 36 Am. Dec. 296; *Rainwater v. Durham*, 2 Nott & McC. (S. C.) 524; s. c. 10 Am. Dec. 637; *Middlebury Coll. v. Chandler*, 16 Vt. 683; s. c. 42 Am. Dec. 537; *Bent v. Manning*, 10 Vt. 225; *Waithman v. Wakefield*, 1 Campb. 120; *Charters v. Bayntun*, 7 Carr. & P. 52; *Rainsford v. Fenwick*, Cart. 215; *Coates v. Wilson*, 5 Esp. 152; *Dilk v. Keighley*, 2 Esp. 480; *Crantz v. Gill*, 2 Esp. 471; *Williams v. Harrison*, Holt, 359; *Peters v. Fleming*, 6 Mees. & W. 42; *Burghart v. Hall*, 4 Mees. and W. 727; *Clowes v. Brooke*, 2 Str. 1101; *Hands v. Slaney*, 8 T. R. 578. The plaintiff has the burden of establishing that the articles furnished were necessities. *Nicholson v. Wilborn*, 13 Ga. 475; *Wood v. Losey*, 50 Mich. 475; *Thrall v. Wright*, 38 Vt. 494. Where an infant has parents or a guardian, he is presumed to have no wants, and will not be liable for necessities. See *McKanna v. Merry*, 61 Ill. 117; *Swift v. Bennett*, 64 Mass. (10 Cush.) 437; *Perrin v. Wilson*, 10 Mo. 451; *Atchison v. Bruff*, 50 Barb. (N. Y.) 381; *Wailing v. Toll*, 9 Johns. (N. Y.) 141; *Klive v. L'Amoureux*, 2 Paige Ch. (N. Y.) 419; *Connolly v. Hull*, 3 McC. (S. C.) 6.

An infant will not be liable for necessities furnished him merely because his father is poor and unable to pay for them. *Hoyt v. Casey*, 114 Mass. 397; s. c. 19 Am. Rep. 371. Where an infant was fully supplied, there can be no recovery, although the article were suitable and the vendor had no knowledge of the supply (*Trainer v. Trumbull*, 141 Mass. 527. See *Davis v. Caldwell*, 66 Mass. (12 Cush.) 512; *Swift v. Bennett*, 64 Mass. (10 Cush.) 436; *Angel v. McLellan*, 16 Mass. 23; s. c. 8 Am. Dec. 118; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80; s. c. 40 Am. Dec. 542; *Barnes v. Tove*, L. R. 13 Q. B. Div. 410); even though the infant represented himself to be of full age. *Wieland v. Kobick*, 110 Ill. 16; *Baker v. Stone*, 136 Mass. 405;

action² against the vendor during infancy, and he may, on arriving at the age of twenty-one years, confirm his purchase.³ An action at law will not lie against an infant for

Merriam v. Cunningham, 65 Mass. (11 Cush.) 40; *Conrad v. Lane*, 26 Minn. 389; s. c. 37 Am. Rep. 412; *Burley v. Russell*, 10 N. H. 184; s. c. 34 Am. Dec. 146; *Studwell v. Shapter*, 54 N. Y. 249; *Heath v. Mahoney*, 7 Hun (N. Y.) 100; *Brown v. McCune*, 5 Sandf. (N. Y.) 224; *Whitcomb v. Joslyn*, 51 Vt. 79; s. c. 31 Am. Rep. 678; *Sims v. Everhart*, 102 U. S. (12 Otto) 300; bk. 26, L. ed. 87; *Bateman v. Kingston*, 6 L. R. (Ir.) 328.

New Hampshire doctrine.—The Supreme Court of New Hampshire has recently held that infants are liable for non-necessaries to the extent to which they are really beneficial. *Bartlett v. Bailey*, 59 N. H. 408; *Hall v. Butterfield*, 59 N. H. 354; s. c. 47 Am. Rep. 209.

Infant's liability for deceit.—An infant is liable for deceit, as by falsely representing himself to be of age, and thereby obtaining credit, and afterwards avoiding his promise to pay by pleading infancy. See *Shaw v. Coffin*, 58 Me. 254; *Eaton v. Hill*, 50 N. H. 237; *Prescott v. Norris*, 32 N. H. 103; *Fitts v. Hall*, 9 N. H. 446, 447; *Eckstein v. Frank*, 1 Daly (N. Y.) 334; *Elwell v. Martin*, 32 Vt. 217; *Towne v. Wiley*, 23 Vt. 359; s. c. 56 Am. Dec. 85. *Fitts v. Hall* is criticised in 1 Am. Lead. Cas. (5th ed.) 262, and discussed in *Merriam v. Cunningham*, 65 Mass. (11 Cush.) 48, and a contrary conclusion reached in *Brown v. McCune*, 5 Sandf. (N. Y.) 224. False representations are not a sufficient answer to a plea of infancy. *Merriam v. Cunningham*, 65 Mass. (11 Cush.) 40, 43; *Burley v. Russell*, 10 N. H. 184; s. c. 34 Am. Dec. 146; *Heath v. Mahoney*, 7 Hun (N. Y.) 100; *People v. Kendall*, 25 Wend. (N. Y.) 399; s. c. 37 Am. Dec. 240; *Stoolfoos v. Jenkins*, 12 Serg. & R. (Pa.) 399; *West v. Moore*, 14 Vt.

447; *De Roo v. Foster*, 12 C. B. N. S. 272; *Wright v. Leonard*, 11 C. B. N. S. 258.

An infant is liable for fraud or tort which is wholly independent of contract. *Matthews v. Cowan*, 59 Ill. 341; *Lewis v. Littlefield*, 15 Me. 233; *Walker v. Davis*, 67 Mass. (1 Gray) 406; *Sikes v. Johnson*, 16 Mass. 389; *Eaton v. Hill*, 50 N. H. 235; *Prescott v. Norris*, 32 N. H. 101; *Fitts v. Hall*, 9 N. H. 441; *Brown v. Maxwell*, 6 Hill (N. Y.) 592; *Hartfield v. Roper*, 21 Wend. (N. Y.) 615; *Bullock v. Babcock*, 3 Wend. (N. Y.) 391; *Wilt v. Welsh*, 6 Watts (Pa.) 9; *Barham v. Turbeville*, 1 Swan. (Tenn.) 437; *Humphrey v. Douglass*, 10 Vt. 71; s. c. 33 Am. Dec. 177; *Baxter v. Bush*, 29 Vt. 465; s. c. 70 Am. Dec. 429; 2 Kent Com. 241.

² *Warwick v. Bruce*, 2 M. & S. 205.

³ Bac. Abr. Infancy (1) 3; *Holt v. Ward Stra.* 939; *Boyden v. Boyden*, 50 Mass. (9 Metc.) 521.

An infant's acts and contracts are voidable only.—*Irvine v. Irvine*, 76 U. S. (9 Wall.) 617; bk. 19, L. ed. 801; *Tucker v. Moreland*, 35 U. S. (10 Pet.) 58; bk. 9, L. ed. 345.

Appointment of agent or attorney by an infant is void. *Ware v. Cartledge*, 24 Ala. 622; s. c. 60 Am. Dec. 489; *Sadler v. Robinson*, 2 Stew. (Ala.) 520; *Waples v. Hastings*, 3 Harr. (Del.) 403; *Cole v. Pennoyer*, 14 Ill. 158; *Fetrow v. Wiseman*, 40 Ind. 148, 155; *Pickler v. State*, 18 Ind. 266; *Trueblood v. Trueblood*, 8 Ind. 195; s. c. 65 Am. Dec. 756; *Whitney v. Dutch*, 14 Mass. 457, 460; s. c. 7 Am. Dec. 229; *Armitage v. Widoe*, 36 Mich. 124; *Robbins v. Mount*, 4 Robt. (N. Y.) 553; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 635; s. c. 30 Am. Dec. 77; *Lawrence's Lessee v. McArther*, 10 Ohio, 37; *Knox v. Flack*, 22 Pa. St. 337; *Doe*

fraudulently representing himself of full age, and thereby inducing the plaintiff to contract with him;⁴ nor would these facts constitute at law a good replication to a plea of infancy;⁵ nor suffice as the basis of a replication on [*23] *equitable grounds.⁶ But they would entitle the plaintiff to relief if made the subject of a bill in equity.⁷

v. Roberts, 16 Mees. & W. 778; *Story on Agency*, 463, 474, 477; 1 Am. Lead. Cas. (3ed.) 248; 3 Com. Dig.; *Tit. Infant B.*; *Co. Lit.* 172, A.

⁴ *Price v. Hewett*, 8 Ex. 146; *Johnson v. Pye*, 1 Sid. 258; s. c. 1 Lev. 169; s. c. 1 Kel. 913; *Adelphi Loan Association v. Fairhurst*, 9 Ex. 422, 430.

Representations which are part of a contract. — Where false representations made by an infant, are substantial parts of a contract, he cannot be held for his breach of promise by merely changing the form of the action. *Lewis v. Littlefield*, 15 Me. 235; *Eaton v. Hill*, 50 N. H. 237; s. c. 9 Am. Dec. 189; *Prescott v. Norris*, 32 N. H. 101; *Fitts v. Hall*, 9 N. H. 441, 445; *Studwell v. Shapter*, 54 N. Y. 249; *Gilson v. Spear*, 38 Vt. 311; *Morrill v. Aden*, 19 Vt. 505; *West v. Moore*, 14 Vt. 447; s. c. 39 Am. Dec. 235; 2 Kent Com. 240. The vendor may take his goods where an infant sets up infancy, in order to avoid paying for them, where the goods are still in the infant's possession. *Jeffords v. Ringgold*, 6 Ala. 544; *Strain v. Wright*, 7 Ga. 568; *Boody v. McKinney*, 23 Me. 525; *Boyden v. Boyden*, 50 Mass. (9 Metc.) 521; *Badger v. Phinney*, 15 Mass. 359; *Fitts v. Hall*, 9 N. H. 446, 447; *Walsh v. Powers*, 43 N. Y. 23, 26; *Henry v. Root*, 33 N. Y. 526. However, if the goods have been sold, lost, used, or the possession otherwise parted with, no action will lie against the infant on avoiding the contract, for not delivering. *Manning v. Johnson*, 26

Ala. 446, 452; s. c. 62 Am. Dec. 732; *Burns v. Hill*, 19 Ga. 22; *Boody v. McKinney*, 23 Me. 525; *Fitts v. Hall*, 9 N. H. 441, 445; *Whitcomb v. Joslyn*, 51 Vt. 79; *Price v. Furman*, 27 Vt. 268, 271; s. c. 65 Am. Dec. 194.

False representations of infant as to age, made by an infant buyer of goods, who afterwards avoided the sale on the ground of his infancy, entitles the vendor to reclaim his goods by replevin. *Badger v. Phinney*, 15 Mass. 359; s. c. 8 Am. Dec. 105. And he may also maintain an action against the infant for falsely representing himself to be of age, and thereby obtaining the goods on credit. See *Nolan v. Jones*, 53 Iowa, 387; *Hughes v. Gallans*, 10 Phila. (Pa.) 618; s. c. 31 Leg. Intel. 349. But see *Curtin v. Patton*, 11 Serg. & R. (Pa.) 310. See also *Johnson v. Pye*, 1 Sid. 258.

⁵ *Johnson v. Pye*, *supra*; *Carpenter v. Carpenter*, 45 Ind. 142.

⁶ *Bartlett v. Wells*, 31 L. J. Q. B. 57; s. c. 1 B. & S. 836; *De Roo v. Foster*, 12 C. B. N. S. 272.

⁷ *Ex parte Unity Joint Stock Banking Association*, 27 L. J., Bank. 33; s. c. 3 De G. & J. (Am. ed.) 63, 64; *Nelson v. Stocker*, 28 L. J. Ch. 760; s. c. 4 De G. & J. (Am. ed.) 458, 464; *Merriam v. Cunningham*, 65 Mass. (11 Cush.) 40; *Conrad v. Lane*, 26 Minn. 389; *Burley v. Russell*, 10 N. H. 184; *Studwell v. Shapter*, 54 N. Y. 249; *Heath v. Mahoney*, 7 Hun (N. Y.) 100; *Stoolfoos v. Jenkins*, 12 Serg. & R. (Pa.) 399; *Whitcomb v. Joslyn*, 51 Vt. 79.

§ 28. But an infant is competent to purchase for cash or on credit a supply of *necessaries*; and his purchase on credit will be valid even though it be shown that he had an income at the time, sufficient to supply him with ready money to buy necessaries suitable to his condition.¹

The necessaries for which the infant may make a valid contract of purchase are stated in Co. Litt. 172, to be "his necessary meat, drinke, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards." But

¹ Burghart v. Hall, 4 M. & W. 727; Peters v. Fleming, 6 M. & W. 42.

Liability of infants for necessaries, though no express bargain is made at the time of the purchase. See Sams v. Stockton, 14 B. Mon. (Ky.) 232; Gay v. Ballou, 4 Wend. (N. Y.) 403; s. c. 51 Am. Dec. 158; Cooper v. Martin, 4 East, 76. The contract to pay may be either express or implied. Earle v. Reed, 51 Mass. (10 Metc.) 387, 390; Stone v. Dennison, 30 Mass. (13 Pick.) 1; s. c. 23 Am. Dec. 654; see Watson v. Hensel, 7 Watts (Pa.) 344. Should a price be agreed upon, it will not be binding upon the infant, and the vendor can recover only the fair price of the article furnished. Morton v. Steward, 5 Ill. App. 533; Earle v. Reed, 51 Mass. (10 Metc.) 387; Stone v. Dennison, 30 Mass. (13 Pick.) 1; s. c. 23 Am. Dec. 654; Boydel v. Drummond, 11 East, 142. However, it has been held that where an infant has an allowance of a sufficient sum to provide himself with necessaries suitable to his fortune and condition, that he is not ordinarily liable for necessaries supplied on credit. Rivers v. Gregg, 5 Rich. (S. C.) Eq. 274. See Connolly v. Hull, 3 McC. (S. C.) 6; Burghart v. Angerstein, 6 Carr. & P. 690; Story v. Pery, 4 Carr. & P. 526; Cook v. Deaton, 3 Carr. & P. 114; Ford v. Fothergill, 1 Esp. 21; Mortara v. Hall, 6 Sim. 465; Brainbridge v. Pickering, 2 W. Bl. 1325.

Compare Burghart v. Hall, 4 Mees. & W. 727. And an over-supply of an infant's wants, though the articles furnished might, in other respects, be ranked as necessaries, will bind him only for such as were actually needed. Johnson v. Lines, 6 Watts & S. (Pa.) 80; s. c. 40 Am. Dec. 542. See Brayshaw v. Eaton, 5 Bing. N. C. 231; Burghart v. Angerstein, 6 Carr. & P. 690, 700; Ford v. Fothergill, 1 Esp. 818.

Liability of infant for reasonable price only; consideration always open to inquiry. Fairmont & A. St. Passenger Ry. Co. v. Stutler, 54 Pa. St. 375; Commonwealth v. Hantz, 2 Pen. & W. (Pa.) 333; Hyer v. Hyatt, 3 Cr. C. C. 276. See Beeler v. Young, 1 Bibb (Ky.) 519; Hussey v. Jewett, 9 Mass. 100; Breed v. Judd, 67 Mass. (1 Gray) 455; Earle v. Reed, 51 Mass. (10 Metc.) 387, 389, 390; Vent v. Osgood, 36 Mass. (19 Pick.) 575; Stone v. Dennison, 30 Mass. (13 Pick.) 1; Locke v. Smith, 41 N. H. 346; McCrillis v. How, 3 N. H. 348; Bouchell v. Clary, 3 Brev. (S. C.) L. 195; Dubose v. Wheddon, 4 McC. (S. C.) 221. And where a note has been given for the price of the articles, the promisee can recover thereon only the reasonable value of the articles furnished. See Guthrie v. Morris, 22 Ark. 411; Earle v. Reed, 51 Mass. (10 Metc.) 387; Dubose v. Wheddon, 4 McC. (S. C.) 221; McMinn v. Richmond, 5 Yerg. (Tenn.) 9; Bradley v. Pratt, 23 Vt. 378.

these are not the only articles that are comprehended by the term.² It includes also articles purchased for *real use* although ornamental, as distinguished from such as are *merely* ornamental, for mere ornaments can be necessary to no one;³ and it was said by Alderson B. in delivering the judgment of the Court in *Chapple v. Cooper*,⁴ after advisement, that “articles of *mere* luxury are always excluded, though luxurious articles of utility are in some cases allowed. . . . In all cases there must be *personal* advantage from the contract derived to the *infant himself*.”⁵ The word necessities must

² *The necessities which will bind an infant* are not such as are absolutely required to support life; see *Strong v. Foote*, 42 Conn. 203; *Davis v. Caldwell*, 66 Mass. (12 Cush.) 513; *Rundel v. Keeler*, 7 Watts (Pa.) 237; but include such as are suitable to the infant's decree and estate. *Rundel v. Keeler*, 7 Watts (Pa.) 237. Where the articles furnished are of the class for which an infant is liable, is a matter of law for the court; whether they are actually necessary, and whether the price is reasonable, is a question of fact for the jury. *Stanton v. Wilson*, 3 Day (Conn.) 37; s. c. 3 Am. Dec. 255; *Cornelia v. Ellis*, 11 Ill. 584; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Merriam v. Cunningham*, 65 Mass. (11 Cush.) 40; *Swift v. Bennett*, 64 Mass. (10 Cush.) 436; *Tupper v. Caldwell*, 53 Mass. (12 Metc.) 563; s. c. 46 Am. Dec. 704; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80, 84; s. c. 40 Am. Dec. 542; *Glover v. Ott*, 1 McCord (S. C.) 572; *Grace v. Hale*, 2 Humph. (Tenn.) 27, 29; s. c. 36 Am. Dec. 296; *Bent v. Manning*, 10 Vt. 225; *Wharton v. McKenzie*, 5 Ad. & E. N. S. 606; *Harrison v. Fane*, 1 Man. & Gr. 550; s. c. 39 Eng. C. L. 556; *Peters v. Fleming*, 6 Mees. & W. 42; *Chapple v. Cooper*, 13 Mees. & W. 252; *Harrison v. Fane*, 1 Scott, N. R. 287; *Hands v. Slaney*, 8 T. R. 578.

³ *Luxuries and articles for ornament and amusement* are not necessities.

Ryder v. Wombwell, L. R. 3 Ex. 90; *Maddox v. Miller*, 1 Maule & S. 738; *Broker v. Scott*, 11 Mees. & W. 67.

⁴ 13 M. & W. 256. See also *per* Bramwell B. in *Ryder v. Wombwell*, L. R. 3 Ex. 90; 37 L. J. Ex. 47.

⁵ *What are necessities.*—As to what are necessities, see *Munson v. Washband*, 31 Conn. 303; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Sams v. Stockton*, 14 B. Mon. (Ky.) 232; *Perkins v. Bailey*, 6 Ia. An. 256; *Levering v. Heighe*, 2 Md. Ch. 81; *Davis v. Caldwell*, 66 Mass. (12 Cush.) 512; *Merriam v. Cunningham*, 65 Mass. (11 Cush.) 40; *Mason v. Wright*, 54 Mass. (13 Metc.) 306; *Tupper v. Cadwell*, 53 Mass. (12 Metc.) 559; s. c. 46 Am. Dec. 704; *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345; *Atchison v. Bruff*, 50 Barb. (N. Y.) 38; *Freeman v. Bridger*, 4 Jones (N. C.) L. 1; s. c. 67 Am. Dec. 258; *Glover v. Ott*, 1 McC. (S. C.) 572; *Rainwater v. Durham*, 2 Nott & McC. (S. C.) 524; s. c. 10 Am. Dec. 637; *Aaron v. Harley*, 6 Rich. (S. C.) Eq. 26; *Grace v. Hale*, 2 Humph. (Tenn.) 27; s. c. 36 Am. Dec. 296; *Thrall v. Wright*, 38 Vt. 494; *Bradley v. Pratt*, 23 Vt. 378; *Middlebury College v. Chandler*, 16 Vt. 683; s. c. 42 Am. Dec. 537.

It must be established that expenditures are for what the law deems necessities, and unless this be shown, it is not competent to introduce evidence to establish the fact, that in a

therefore be regarded as a relative term, to be construed with reference to the infant's age, state, and degree.⁶

§ 29. The cases in which these principles have been applied are quite too numerous to be reviewed in detail, but some examples may be selected, before considering the question whether it is for the Court or jury to determine in each case what are or are not necessities for the infant.

pecuniary point of view, the expenditure was beneficial to the infant. *Tupper v. Cadwell*, 53 Mass. (12 Metc.) 563; s. c. 46 Am. Dec. 704; *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N. H. 345.

⁶ 2 Stephen Com. (ed. 1874) 207.

American authorities. — *Lefils v. Sugg*, 15 Ark. 137; *Strong v. Foote*, 42 Conn. 203; *Davis v. Caldwell*, 66 Mass. (12 Cush.) 513; *Tupper v. Cadwell*, 53 Mass. (12 Metc.) 559, 562, 563; s. c. 46 Am. Dec. 704; *Breed v. Judd*, 67 Mass. (1 Gray) 453; *Bradley v. Pratt*, 23 Vt. 373; 2 Kent Com. 239.

For a legal definition of "necessaries" involving the liability of infants, see *Lefils v. Sugg*, 15 Ark. 137; *Strong v. Foote*, 42 Conn. 203; *Breed v. Judd*, 67 Mass. (1 Gray) 455, 458; *Davis v. Caldwell*, 86 Mass. (15 Cush.) 513; *Tupper v. Cadwell*, 53 Mass. (12 Metc.) 562; s. c. 46 Am. Dec. 704; *Phelps v. Worcester*, 11 N. H. 51; *Bradley v. Pratt*, 23 Vt. 373; 2 Kent Com. 239.

Goods to carry on trade are not necessities. *Merriam v. Cunningham*, 65 Mass. (11 Cush.) 40; *Tupper v. Cadwell*, 53 Mass. (12 Metc.) 559; s. c. 46 Am. Dec. 704; *Decell v. Lewenthal*, 57 Miss. 331; s. c. 34 Am. Rep. 449; *Grace v. Hale*, 2 Humph. (Tenn.) 27; *Tuberville v. Whitehouse*, 1 Carr. & P. 94; *Whittingham v. Hill*, Cro. Jac. 494; *Dilk v. Keighley*, 2 Esp. 480; *Whywall v. Champion*, 2 Str. 1083; 1 Parsons on Contr. (5th ed.) 313; 1 Story on Contr. sec. 127; Tyler on Infancy, sec. 76. Thus an infant carrying on a plantation, is

not liable, as for necessities, for supplies, and money furnished for the plantation. *Decell v. Lewenthal*, 57 Miss. 331. And where an infant engaged in the hack business, it was held that he was not liable for the board of the horses used in such business. *Merriam v. Cunningham*, 65 Mass. (11 Cush.) 40. See, also, *Mason v. Wright*, 54 Mass. (13 Metc.) 306. Ordinarily horses are not necessities. *McKenna v. Merry*, 61 Ill. 177; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Smith-peter v. Griffin*, 10 B. Mon. (Ky.) 259; *Merriam v. Cunningham*, 65 Mass. (11 Cush.) 40; *Miller v. Smith*, 26 Minn. 248; *Rainwater v. Durham*, 2 Nott & McC. (S. C.) 584; s. c. 10 Am. Dec. 637; *Grace v. Hale*, 2 Humph. (Tenn.) 27; s. c. 36 Am. Dec. 296. But see *Mohney v. Evans*, 51 Pa. St. 80, where it was left for the jury to decide whether cattle purchased by a minor to carry on the business of farming were necessities. See, also, *Rundel v. Keeler*, 7 Watts (Pa.) 239.

An infant who is a married man, while liable for necessities furnished his wife and family, (*vide*, § 27, note 5). yet he will not be liable for the board of horses used in the infant's business of hackman where occasionally and incidentally used to take his family out riding. See *Mason v. Wright*, 54 Mass. (13 Metc.) 306. But as to liability of an infant who has an invalid family requiring exercise in the open air, for a horse furnished them to ride out in pleasant weather, see *Cornelia v. Ellis*, 11 Ill. 584.

Articles supplied to an undergraduate at Oxford for dinners given to his friends at his rooms, fruit, confectionery, &c. &c. were held not necessities by the Queen's Bench in **Wharton v. McKenzie*,¹ and the Exchequer of Pleas, in a case exactly similar, held that there was no evidence for the jury, and that the plaintiff should be nonsuited.²

But where a jury had found that a purchase for the amount of 8*l.* 0*s.* 6*d.* for gold rings, a watch-chain, and a pair of breast-pins, were "necessaries" for an undergraduate at Cambridge, the son of a gentleman of fortune and a Member of Parliament, the Exchequer refused to set aside the verdict, holding the question to be one for the jury.³ Where the defendant, a captain in the army, had ordered livery for his servant and cockades for some of his soldiers, the jury found both to be necessities; but the Court, on motion for new trial, required the plaintiff to abandon the charge for the cockades, holding that they were not necessities, Lord Kenyon observing, that as regarded the livery, he could not say that it was not necessary for a gentleman in defendant's position to have a servant, and if so, the livery was necessary.⁴ In perilous times, Lord Ellenborough held that regimentals sold to an infant as a member of a volunteer corps enrolled for the national defence, were necessities.⁵ But a chronometer, costing 68*l.*, was held, in the absence of proof that it was essential, not to be a necessary for an infant who was a lieutenant in the royal navy.⁶ A purchase of a horse by an infant may be valid if it be shown to be suitable to his rank and fortune to keep horses, or if it were rendered necessary by circumstances that he should keep one, as, if he were directed by his physician to ride for exercise:⁷ but a purchase of cigars and tobacco by an infant was held not to bind him;⁸ nor was the plaintiff allowed to recover the cost of a silver goblet sold to an infant for 15*l.* 15*s.*, which the plaintiff knew

¹ 5 Q. B. 606.

² *Brooker v. Scott*, 11 M. & W. 67.

³ *Peters v. Fleming*, 6 M. & W. 42.

⁴ *Hands v. Slaney*, 8 T. R. 578.

⁵ *Coates v. Wilson*, 5 Esp. 152.

⁶ *Berolles v. Ramsay*, Holt N. P.

⁷ *Hart v. Prater*, 1 Jur. 623.

⁸ *Bryant v. Richardson*, 14 L. T. N. S. 24; L. R. 3 Ex. 93, in note.

when he supplied it to be intended by the infant for a present to a friend.⁹

§ 30. * In the case of *Ryder v. Wombell*¹ it was [*25] finally settled, that the issue whether goods sold to an infant are necessaries is a question of fact to be left to the jury; but that in this, as in all other like questions, the modern rule is, not as formerly that a case must go to the jury if there be a scintilla of evidence, but that the judge is to determine (subject of course to review), whether there is evidence that ought reasonably to satisfy the jury that the fact sought to be proved is established.² The facts were that the defendant, the son of a deceased baronet, was in the enjoyment in his own right of an allowance of 500*l.* a year, during his minority, and entitled to 20,000*l.* on coming of age. He had no fixed residence, but lived, when in London, with his mother, and when in the country, with his eldest brother, free of charge. The plaintiff sought to recover from him the following sums:—1st, 25*l.* for a pair of solitaires, or sleeve-buttons, with rubies and diamonds; 2d, 6*l.* 10*s.* for a smelling-bottle, ornamented with precious stones; 3d, 15*l.* 15*s.* for an antique silver goblet, with an inscription; 4th, 13*l.* 13*s.* for a pair of coral ear-rings.

⁹ *Ryder v. Wombwell*, L. R. 3 Ex. 90; in *Cam. Scacc.* 4 Ex. 32.

Infant's hotel bill.—An inn-keeper is bound to receive and entertain all applicants, whether adults or infants, who are apparently responsible and of good conduct; and for that reason may recover from an infant for entertainment furnished him. *Watson v. Cross*, 2 Duv. (Ky.) 147.

¹ L. R. 3 Ex. 90; 4 Ex. 32. See *Mohney v. Evans*, 51 Pa. St. 80.

² *It is a question of law for the court* to determine whether the articles are in the class of necessaries, and then for the jury to determine whether in this particular case they were required by the infant. *McKanna v. Merry*, 61 Ill. 173; *Davis v. Caldwell*, 66 Mass. (12 Cush.) 512; *Merriam v. Cunningham*, 65 Mass. (11 Cush.)

40; *Swift v. Bennett*, 64 Mass. (10 Cush.) 436; *Jordan v. Coffield*, 70 N. C. 110. The Supreme Court of Pennsylvania have said: "We do not mean to give up the restraints which the law puts on those who furnish infants with the means of extravagance, of disorderly or intemperate life, nor even to concede in all cases that the jury are the sole judges of what is necessary and proper. The court ought to have a superintending power, and in gross cases set aside a verdict. But many cases are composed of so many circumstances of which the jury are the proper judges, that it must be submitted to them." *Rundell v. Keeler*, 7 Watts (Pa.) 237; approved in *Mohney v. Evans*, 51 Pa. St. 80, 83.

The goblet was wanted, as the plaintiff was told by the defendant, for a present to a friend, at whose house the defendant had been frequently a guest. Kelly C. B. rejected evidence offered by the defendant to show that at the time of the purchase of the solitaires, the infant had already purchased articles of a similar description to a large amount, no proof being offered that the plaintiff knew this. The learned Chief Baron refused to nonsuit, but left it to the jury to say whether all or any of the articles were necessities, suitable to the estate and condition in life of the defendant. The jury found that the solitaires and goblet were necessities, the other articles not. Leave was reserved to move for a nonsuit, or for reduction of damages, if the Court should be of opinion that there was evidence for the jury that one of the two articles was necessary, and not the other. Bramwell B. was of opinion that the plaintiff

ought to have been nonsuited, or a verdict given for the [*26] defendant; and *that the evidence to show that the defendant was already supplied with similar articles, ought to have been received. Kelly C. B. delivered the judgment, holding, — first, that the evidence rejected at the trial was properly excluded; secondly, that the verdict for the price of the goblet was against evidence, and should be set aside; and thirdly, that the defendant might have a new trial *on payment of costs*, if he desired it, for the price of the solitaires. On the appeal it was held unanimously that the plaintiff ought to have been nonsuited. In the opinion delivered by Willes J. he made the following important preliminary observations: “We must first observe that the question in such cases is not whether the expenditure is one which an infant in the defendant’s position could not properly incur. There is no doubt that an infant may buy jewelry or plate if he has the money to pay, and pays for it;”⁸

⁸ *Non-necessaries*. — An infant is not liable for non-necessaries, but if he pays for them on attaining majority, he cannot recover back the purchase price. See *Peters v. Lord*, 18 Conn. 337; *Harney v. Owen*, 4 Blackf. (Ind.) 337; s. c. 30 Am. Dec.

662; *Wheatly v. Miscal*, 5 Ind. 142; *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113; *Robinson v. Weeks*, 56 Me. 102; *Judkins v. Walker*, 17 Me. 38; s. c. 35 Am. Dec. 229; *Breed v. Judd*, 67 Mass. (1 Gray) 455; *Vent v. Osgood*, 36 Mass.

but the question is, *whether it is so necessary for the purpose of maintaining himself in his station that he should have these articles, as to bring them within the exception under which an infant may pledge his credit for them as necessities.*" In reference to this question the Court held that judges know as well as juries what is the usual and normal state of things, and consequently whether any particular article is of such description as that it may be a necessary under such usual state of things:⁴ that if the state of things be unusual, new,

(19 Pick.) 572; *Stone v. Dennison*, 30 Mass. (13 Pick.) 1; s. c. 23 Am. Dec. 654; *Moses v. Stevens*, 19 Mass. (2 Pick.) 332; *Badger v. Phinney*, 15 Mass. 359; s. c. 8 Am. Dec. 105; *Lufkin v. Mayall*, 25 N. H. (5 Fost.) 82; *Weeks v. Leighton*, 5 N. H. 343; *McCoy v. Huffman*, 8 Cow. (N. Y.) 84; *Whitmarsh v. Hall*, 3 Den. (N. Y.) 375; *Medbury v. Watrous*, 7 Hill (N. Y.) 110; *Smith v. Evans*, 5 Humph. (Tenn.) 70; *Thomas v. Dike*, 11 Vt. 273; *In re Burrows*, 8 De G., M. & G. 254, 258; *Buckinghamshire v. Drury*, 2 Eden, 60; *Holmes v. Blogg*, 8 Taunt. 508; 1 *Parsons on Contr.* (ed. 1853) 268. But see *Hill v. Anderson*, 13 Miss. (5 Smed. & M.) 216; *Cummings v. Powell*, 8 Tex. 80. But where the infant, on rescinding, tenders back the articles substantially as received, he may recover the money paid. *Riley v. Mallory*, 33 Conn. 201; *Price v. Furman*, 27 Vt. 268; s. c. 45 Am. Dec. 194.

⁴ *Province of the court and jury.* — In the case of *Merriam v. Cunningham*, 65 Mass. (11 Cush.) 40, 44, the court say: "It is the well-settled rule that it is the province of the court to determine whether the articles sued for are within the class of necessities, and if so, it is the proper duty of the jury to pass upon the question of the quantity, quality, and their adaptation to the condition and wants of the infant." See also *Stanton v. Wilson*, 3 Day (Conn.) 37; *Bonney v. Reardin*, 6 Bush (Ky.) 34;

Beeler v. Young, 1 Bibb (Ky.) 519; *Eames v. Sweetser*, 101 Mass. 78, 81; *Hall v. Weir*, 83 Mass. (1 Allen) 261; *Davis v. Caldwell*, 66 Mass. (12 Cush.) 512, 514; *Swift v. Bennett*, 64 Mass. (10 Cush.) 436; *Tupper v. Cadwell*, 53 Mass. (10 Metc.) 563; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80, 84; *Glover v. Ott*, 1 McCord (S. C.) 571, 572; *Grace v. Hale*, 2 Humph. (Tenn.) 27, 29; *Bent v. Manning*, 10 Vt. 225; *Cripps v. Hills*, 5 Q. B. 606; *Davis v. Caldwell*, 66 Mass. (12 Cush.) 512. Chief Justice Shaw said in *Merriam v. Cunningham*, *supra*: "In most cases, whether necessities or not, is a question of fact for the jury, depending upon the circumstances; and the two principal circumstances are, whether the articles are suitable to the infant's state and condition, and whether he is, or not, without other means of supply." See *Bonney v. Reardin*, 6 Bush (Ky.) 34. After having referred to *Peters v. Fleming*, 6 Mees. & W. 42; *Wharton v. McKenzie*, 5 Q. B. 606; and to *Cripps v. Hills*, 5 Q. B. 606, Judge Shaw observed: "In these cases, it is held, and we think this is the true view of the law on this subject, that whether the articles sued for were necessities or not, is a question of fact to be submitted to a jury, unless in a very clear case, when a judge would be warranted in directing a jury authoritatively, that some articles, as for instance, diamonds and race-horses, cannot be necessities for an infant."

or exceptional, then a question of fact arises to be decided by a jury under proper direction: *that the judge must determine whether the case is such as to cast on the vendor the onus of proving the articles to be necessaries within the exception, and whether there is sufficient evidence to satisfy that onus.* In the application of these principles to the case before it, the Court held that it was not bound to consider itself so ignorant of every usage of mankind, as to be compelled, in the absence of all evidence on the subject, to take the opinion of a jury whether it is so necessary for a gentleman to wear solitaires of this description, that, though an infant, he must obtain them on credit rather than go without them.

On the point as to the exclusion of the evidence [*27] on the *trial, the Court of Error expressly refused to decide, reserving it "to be determined hereafter."⁵

§ 31. If an infant be married, his obligations as husband and father in supplying necessaries are the same as if he were of full age and the things necessary for his wife and children are necessary for himself, and what is supplied to them on his express or implied credit is considered as purchased by him.¹ An illustration of the maxim, "*Persona*

⁵ *Whether the infant had any other means of support is a proper question in such cases.* See *Davis v. Caldwell*, 66 Mass. (12 Cush.) 512; *Swift v. Bennett*, 63 Mass. (10 Cush.) 436; 2 Kent Com. 289.

Subject to parent or guardian. — An infant living with his parents or guardian, and supported by them, cannot be bound on a contract for necessaries. See *Simms v. Norris*, 5 Ala. 42; *McKanna v. Merry*, 61 Ill. 177; *Hoyt v. Casey*, 114 Mass. 397; s. c. 19 Am. Rep. 371; *Angel v. McLellan*, 16 Mass. 28; s. c. 8 Am. Dec. 118; *Perrin v. Wilson*, 10 Mo. 451; *Wailing v. Toll*, 9 Johns. (N. Y.) 141; *Kline v. L'Amoureux*, 2 Paige Ch. (N. Y.) 419; s. c. 22 Am. Dec. 652; *Johnson v. Lines*, 6 Watts & S. (Pa.) 83; s. c. 66 Am. Dec. 193; *Guthrie v. Murphy*, 4 Watts (Pa.) 80; s. c.

28 Am. Dec. 681; *Connolly v. Hull*, 3 McC. (S. C.) L. 6; *Jones v. Colvin*, 1 McMull. (S. C.) 14; *Elrod v. Myers*, 2 Head (Tenn.) 33. See *Simms v. Norris*, 5 Ala. 42; *Perrin v. Wilson*, 10 Me. 451; *Angel v. McLellan*, 16 Mass. 28; s. c. 8 Am. Dec. 118; *Phelps v. Worcester*, 11 N. H. 51, 53; *Wailing v. Toll*, 9 Johns. (N. Y.) 141; *Kline v. L'Amoureux*, 2 Paige Ch. (N. Y.) 419; s. c. 22 Am. Dec. 652; *Guthrie v. Murphy*, 4 Watts (Pa.) 180; s. c. 28 Am. Dec. 681; *Johnson v. Lines*, 6 Watts & S. (Pa.) 80, 83; s. c. 66 Am. Dec. 193; *Hull v. Connolly*, 3 McC. (S. C.) 6.

¹ *Turner v. Trisby*, 1 Str. 168; *Rainsford v. Fenwick*, Carter, 215.

American authorities. — *Beeler v. Young*, 1 Bibb (Ky.) 519, 520; *Davis v. Caldwell*, 66 Mass. (12 Cush.) 512; *Merriam v. Cunningham*, 65 Mass.

conjuncta æquiparatur interesse proprio," is given in Broom's Maxims in these terms:—"So if a man under the age of twenty-one contract for the nursing of his lawful child, this contract is good and shall not be avoided by infancy, no more than if he had contracted for his own aliment or erudition."²

§ 32. An infant being considered in law as devoid of sufficient discretion to carry on a trade, is not liable on a purchase of goods supplied to him for his trade, as being necessities, whether he be trading alone or in partnership with another.¹ But if he uses for necessary household purposes goods supplied to him as a tradesman, he becomes liable for what is so used."²

In *Thornton v. Illingworth*,³ a purchase of goods by an infant for the purposes of trade was treated by the Queen's Bench as constituting an exception to the general rule that the contracts of infants are voidable only, not void. Bayley J. said: "In the case of an infant, a contract made for goods, for the purposes of trade, is absolutely void, not voidable only. The law considers it against good policy that he should be allowed to bind himself by such contracts." Littledale J. concurred in this view.⁴

(11 Cush.) 40; *Tupper v. Cadwell*, 53 Mass. (12 Metc.) 562; s. c. 46 Am. Dec. 704; *Abell v. Warren*, 4 Vt. 149; *Rainsford v. Fenwick*, Carter, 215; *Turnery v. Trisby*, 1 Str. 168.

² *Necessaries furnished wife*.—Regarding liability of infant for necessities furnished his wife and family, see *Cantine v. Phillips*, 5 Harr. (Del.) 428; *Beeler v. Young*, 1 Bibb (Ky.) 519; *Abell v. Warren*, 4 Vt. 149, 152; *vide supra*, p. 24, § 39, note 7; p. 61, § 28, note 6.

¹ *Whywall v. Champion*, Stra. 1083; *Dilk v. Keighley*, 2 Esp. 480; *Mason v. Wright*, 54 Mass. (13 Metc.) 306; *Tupper v. Cadwell*, 66 Mass. (12 Metc.) 562; s. c. 46 Am. Dec. 704.

³ *Tuberville v. Whitehouse*, 1 Car. & P. 94.

American authorities.—*Price v. Sanders*, 60 Ind. 310; *Mason v. Wright*, 54 Mass. (13 Metc.) 306; *Decell v. Lewenthal*, 57 Miss. 331; s. c. 34 Am. Rep. 449; *Mohney v. Evans*, 51 Pa. St. 30.

³ 2 Barn. & C. 824. See, also, *Belton v. Hodges*, 9 Bing. 365.

⁴ In *Williams v. Moor*, 11 Mees. & W. 256, 258, Parke B., speaking with reference to *Thornton v. Illingworth*, 2 Barn. & C. 825, said: "Holyroyd J. does not adopt the distinction taken by Bayley J. that a promise to pay for goods not necessities may be ratified, but that a promise to pay for goods purchased for the purposes of trade is void. The promise is not void in any case unless the infant chooses to plead his infancy."

But in the previous case of *Warwick v. Bruce*⁵ (not cited in *Thornton v. Illingworth*), where the infant was plaintiff by his next friend, it appeared that the infant had paid 40*l.*, part of the total price of 87*l.* 10*s.* which he had [*28] agreed to give for * a quantity of potatoes, and Lord Ellenborough nonsuited the plaintiff on the objection that the contract was a trading contract. A new trial was granted, Lord Ellenborough saying: "It occurred to me at the trial, on the first view of the case, that as an infant could not trade, and as this was an executory contract, he could not maintain an action for the breach of it; but if I had adverted to the circumstance of its being in part executed by the infant, for he had paid 40*l.*, and therefore it was most immediately for his benefit that he should be enabled to sue upon it, otherwise he might lose the benefit of such payment, I should probably have held otherwise. And I certainly was under a mistake in not adverting to the distinction between the case of an infant plaintiff or defendant. If the defendant had been the infant, what I ruled would then have been correct; but here the plaintiff is the infant, and sues upon a contract partly executed by him, which it is clear that he may do."

This case is not reconcilable with the *dicta* of the judge in *Thornton v. Illingworth*, for it is plain that if a contract is *absolutely void*, no action can be maintained on it or for the breach of it by anybody. The facts and circumstances of the two cases are widely dissimilar, and the *decision* in the earlier case seems to be more in accordance with general principles than the *reasoning* in the later case.⁶ The language of the

⁵ 2 M. & S. 205.

⁶ *Earle v. Reed*, 51 Mass. (10 Metc.) 387, 389.

Void and voidable contracts.—The tendency of the decisions is to hold trading contract of infants, voidable and not absolutely void in all cases. *Weaver v. Jones*, 24 Ala. 420, 424; *Slaughter v. Cunningham*, 24 Ala. 260; s. c. 40 Am. Dec. 463; *Guthrie v. Morris*, 22 Ark. 411; *Harrod v. Hyers*, 21 Ark. 592; s. c. 76 Am.

Dec. 409; *Buzzell v. Bennett*, 2 Cal. 101; *Wallace v. Lewis*, 4 Harr. (Del.) 75; *Cole v. Pennoyer*, 14 Ill. 158; *Fetrow v. Wiseman*, 40 Ind. 148; *Chapman v. Chapman*, 13 Ind. 396; *Johnson v. Rockwell*, 12 Ind. 76; *Babcock v. Doe*, 8 Ind. 110; *Moore v. Abernathy*, 7 Blackf. (Ind.) 442; *Jenkins v. Jenkins*, 12 Iowa, 195; *Phillips v. Green*, 5 T. B. Mon. (Ky.) 344; *Best v. Givens*, 3 B. Mon. (Ky.) 72; *Hardy v. Waters*, 38 Me. 450;

learned judges in *Thornton v. Illingworth* was wider than was required for the decision of the case before them, and another proposition contained in the same opinion has been overruled, as shown by Lord Denman in *Bateman v. Pinder*,⁷ decided in 1842.

[It should be observed that the Infants' Relief Act, 1874, *post*, p. 30, applies to the trading contracts of an infant; and an infant trader cannot be adjudicated a bankrupt on the petition of a person who has supplied him with goods on credit for the purposes of trade.⁸]

§ 33. * Previous to the Infants' Relief Act an in- [*29]
fant might, on arriving at the age of twenty-one
years, ratify and confirm a purchase made during infancy,¹

Lowe v. Gist, 5 Har. & J. (Md.) 106; *Kennedy v. Doyle*, 92 Mass. (10 Allen) 161; *Allis v. Billings*, 47 Mass. (6 Metc.) 417; s. c. 39 Am. Dec. 740; *Earle v. Reed*, 51 Mass. (10 Metc.) 387; *Commonwealth v. Weiher*, 44 Mass. (3 Metc.) 445, 448; *Reed v. Batchelder*, 42 Mass. (1 Metc.) 559; *Kendall v. Lawrence*, 39 Mass. (22 Pick.) 540; *Worcester v. Eaton*, 13 Mass. 371, 375; s. c. 7 Am. Dec. 155; *Ferguson v. Bell*, 17 Mo. 347; *Cook v. Toumbs*, 36 Miss. 685; *Wright v. Steele*, 2 N. H. 51; *Merchants' F. Ins. Co. v. Grant*, 2 Edw. Ch. (N. Y.) 546; *Eagle F. Co. v. Lent*, 1 Edw. Ch. (N. Y.) 301; *Gillet v. Stanley*, 1 Hill (N. Y.) 121; *Van Nostrand v. Wright*, Hill & Den. (N. Y.) 260; *Dominick v. Michael*, 4 Sandf. (N. Y.) 374; *Everson v. Carpenter*, 17 Wend. (N. Y.) 419; *Bool v. Mix*, 17 Wend. (N. Y.) 119; s. c. 31 Am. Dec. 285; *Goodsell v. Myers*, 3 Wend. (N. Y.) 479; *White v. Flora*, 2 Overt. (Tenn.) 426; *Wheaton v. East*, 5 Yerg. (Tenn.) 41; *Cummings v. Powell*, 8 Tex. 80; *Mustard v. Wohlford*, 15 Gratt. (Va.) 329, 337; s. c. 76 Am. Dec. 209; *Abell v. Warren*, 4 Vt. 149, 152; *Young v. Bell*, 1 Cr. C. C. 342; *Williams v. Moor*, 11 Mees. & W. 256; 2 Kent Com. 234, 235, 236.

⁷ 3 Q. B. 574.

⁸ *Ex parte Jones*, 18 Ch. D. 109, C. A., overruling *Ex parte Lynch*, 2 Ch. D. 227; and a decision to the same effect in Ireland, *In re Rainys*, 3 Ir. L. R. (Ch.) 459; and see *Reg. v. Wilson*, 5 Q. B. D. 28, C. C. R.

¹ *Ratification of infant*.—A contract made during minority may be ratified after he has attained majority. *Vaughan v. Parr*, 20 Ark. 600; *Wilcox v. Roath*, 12 Conn. 550; *Kline v. Beebe*, 6 Conn. 494; *Wimberly v. Jones*, 1 Ga. Dec. 91; *Martin v. Byron*, Dudley (Ga.) 203; *Hartman v. Kendall*, 4 Ind. 403; *Johnson v. Alden*, 15 La. An. 505; *Taylor v. Rundell*, 2 La. An. 367; *Boody v. McKenney*, 23 Me. 517; *Lawson v. Lovejoy*, 8 Me. (8 Greenl.) 405; *Levering v. Heighe*, 2 Md. Ch. 81; *Kennedy v. Doyle*, 92 Mass. (10 Allen) 161; *Proctor v. Sears*, 86 Mass. (4 Allen) 95; *Boyd v. Boyden*, 50 Mass. (9 Metc.) 519; *Thompson v. Lay*, 21 Mass. (4 Pick.) 48; s. c. 16 Am. Dec. 325; *Barnaby v. Barnaby*, 18 Mass. (1 Pick.) 221, 223; *Ford v. Phillips*, 18 Mass. (1 Pick.) 202; *Whitney v. Dutch*, 14 Mass. 457; s. c. 7 Am. Dec. 229; *Martin v. Mayo*, 10 Mass. 137, 140; s. c. 6 Am. Dec. 103; *Smith v. Mayo*, 9 Mass. 62, 64; s. c. 6 Am. Dec. 28; *Mayer v. McLure*, 36 Miss. 389; *New Hampshire Mut. F. Ins. Co. v. Noyes*, 32 N.

H. 345; *Edgerly v. Shaw*, 25 N. H. (5 Fost.) 514; s. c. 57 Am. Dec. 349; *Emmons v. Murray*, 16 N. H. 385; *Aldrich v. Grimes*, 10 N. H. 194; *Williams v. Mabel*, 7 N. J. Eq. (3 Halst.) 500; *Henry v. Root*, 33 N. Y. 526; *Taft v. Sergeant*, 18 Barb. (N. Y.) 320; *Ackerman v. Runyon*, 1 Hilt. (N. Y.) 169; s. c. 3 Abb. (N. Y.) Pr. 111; *Millard v. Hewlett*, 19 Wend. (N. Y.) 301; *Delano v. Blake*, 11 Wend. (N. Y.) 85; s. c. 25 Am. Dec. 617; *Goodsell v. Myers*, 3 Wend. (N. Y.) 479; *Alexander v. Hutcheson*, 2 Hawks. (N. C.) 535; *Armfield v. Tate*, 7 Ired. (N. C.) L. 258; *Alexander v. Heriot*, 1 Bailey (S. C.) Ch. 223; *Summers v. Wilson*, 2 Coldw. (Tenn.) 469; *Reed v. Boshears*, 4 Sneed (Tenn.) 118; *Wheaton v. East*, 5 Yerg. (Tenn.) 41; s. c. 26 Am. Dec. 251; *Buckner v. Smith*, 1 Wash. (Va.) 295; s. c. 1 Am. Dec. 463; *Forsyth v. Hastings*, 27 Vt. 646; *Farr v. Sumner*, 12 Vt. 28; s. c. 36 Am. Dec. 327; *Stokes v. Brown*, 4 Chand. (Wis.) 39.

Knowledge of freedom from liability is necessary in order to render a ratification, after attaining majority, binding. *Deason v. Boyd*, 1 Dana (Ky.) 45; *Boody v. McKenney*, 23 Me. 517; *Thing v. Libbey*, 16 Me. 57; *Lawson v. Lovejoy*, 8 Me. (8 Greenl.) 405; s. c. 23 Am. Dec. 526; *Smith v. Kelley*, 54 Mass. (13 Metc.) 309; *Boyd v. Boyden*, 50 Mass. (9 Metc.) 519; *Ford v. Phillips*, 18 Mass. (1 Pick.) 203; *Smith v. Mayo*, 9 Mass. 64; s. c. 6 Am. Dec. 28; *Robbins v. Eaton*, 10 N. H. 561; *Aldrich v. Grimes*, 10 N. H. 194; *Kitchen v. Lee*, 11 Paige Ch. (N. Y.) 107; s. c. 42 Am. Dec. 101; *Curtin v. Patton*, 11 Serg. & R. (Pa.) 305; *Eubanks v. Peak*, 2 Bail. (S. C.) L. 497, 499; *Alexander v. Heriot*, 1 Bail. (S. C.) Eq. 223; *Norris v. Vance*, 3 Rich. (S. C.) L. 168; *Cheshire v. Barrett*, 4 McCord (S. C.) L. 241; s. c. 17 Am. Dec. 735; *Reed v. Boshears*, 4 Sneed (Tenn.) 118; *Harmer v. Killing*, 5 Esp. 102.

Disaffirmance of contract: return of property.—Where an infant disaffirms a contract on attaining majority, he must return the property before he can recover the money. *Strain v. Wright*, 7 Ga. 568; *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113; *Hill v. Anderson*, 13 Miss. (5 Smed. & M.) 216; *Bartholomew v. Finnomere*, 17 Barb. (N. Y.) 428; *Hillyer v. Bennett*, 3 Edw. Ch. (N. Y.) 222; *Kitchen v. Lee*, 11 Paige Ch. (N. Y.) 107; s. c. 42 Am. Dec. 101; *Ottman v. Moak*, 3 Sandf. Ch. (N. Y.) 431; *Kilgore v. Jordan*, 17 Tex. 341. It is otherwise where the property is not in his hands or under his control. *Fitts v. Hall*, 9 N. H. 441; *Price v. Furman*, 27 Vt. 268, 271; s. c. 65 Am. Dec. 194.

Infant's deed to real estate.—An infant may ratify or disaffirm a deed given to real estate during majority (*Voorhies v. Voorhies*, 24 Barb. (N. Y.) 150); but a mere expression or acknowledgment that the conveyance had been made, or a failure to disaffirm for a great length of time, will not amount to a ratification of the transaction. *Doe v. Abernathy*, 7 Blackf. (Ind.) 442; *Boody v. McKenney*, 23 Me. 517; *Jackson v. Burchin*, 14 Johns. (N. Y.) 124; *Jackson v. Carpenter*, 11 Johns. (N. Y.) 542, 543; *Boal v. Mix*, 17 Wend. (N. Y.) 120; s. c. 31 Am. Dec. 235; *Drake v. Ramsay*, 5 Ohio, 251; *Curtin v. Patton*, 11 Serg. & R. (Pa.) 307. But where such conveyance is recognized in an instrument executed after attaining majority, this will be deemed a ratification. *Phillips v. Green*, 5 T. B. Mon. (Ky.) 344; *Boston Bank v. Chamberlain*, 15 Mass. 220; *Story v. Johnson*, 2 Y. & Coll. 586. And a deed of confirmation is not necessary. *Dearborn v. Eastman*, 4 N. H. 441; *Hoyle v. Stowe*, 2 Dev. & Bat. (N. C.) L. 320; *Wheaton v. East*, 5 Yerg. (Tenn.) 41; s. c. 26 Am. Dec. 251; *Houser v. Reynolds*, 1 How. (N. C.) 143; s. c. 1 Am. Dec. 55.

Acts which amount to a confirmation.—The contract of an infant may be

ratified expressly or implicitly, after the disability has ceased. *Vaughan v. Parr*, 20 Ark. 600; *Johnson v. Alden*, 15 La. An. 505; *Taylor v. Rundell*, 2 La. An. 387; *Lawson v. Lovejoy*, 8 Me. (8 Greenl.) 405; *Kennedy v. Doyle*, 92 Mass. (10 Allen) 161; *Boyden v. Boyden*, 50 Mass. (9 Metc.) 519; *Whitney v. Dutch*, 14 Mass. 457; s. c. 7 Am. Dec. 229; *Mayer v. McLure*, 36 Miss. 389; s. c. 72 Am. Dec. 190; *New Hampshire Mut. Fire Ins. Co. v. Noyes*, 32 N. H. 345; *Aldrich v. Grimes*, 10 N. H. 194; *Henry v. Root*, 33 N. Y. 526; *Delano v. Blake*, 11 Wend. (N. Y.) 85; s. c. 25 Am. Dec. 617; *Alexander v. Heriot*, 1 Bail. (S. C.) Ch. 223; *Forsyth v. Hastings*, 27 Vt. 646; *Farr v. Sumner*, 12 Vt. 28; s. c. 36 Am. Dec. 327. The acts and declarations of an infant after he becomes of age, which are sufficient to ratify a contract made during infancy, must be direct and positive, a mere acknowledgment not being sufficient for that purpose. *Wilcox v. Roath*, 12 Conn. 550; *Kline v. Beebe*, 6 Conn. 494; *Wallace v. Lewis*, 4 Harr. (Del.) 75; *Martin v. Byrom*, *Dudley* (Ga.) 203; *Chandler v. Simmons*, 97 Mass. 511, 512; *Morse v. Wheeler*, 86 Mass. (4 Allen) 570; *Proctor v. Sears*, 86 Mass. (4 Allen) 95; *Thompson v. Lay*, 21 Mass. (4 Pick.) 48; s. c. 16 Am. Dec. 325; *Barnaby v. Barnaby*, 18 Mass. (1 Pick.) 221, 223; *Ford v. Phillips*, 18 Mass. (1 Pick.) 202; *Whitney v. Dutch*, 14 Mass. 457, 460; s. c. 7 Am. Dec. 229; *Martin v. Mayo*, 10 Mass. 139, 140; s. c. 6 Am. Dec. 103; *Smith v. Mayo*, 9 Mass. 62, 64; s. c. 6 Am. Dec. 28; *Clamorgan v. Lane*, 9 Mo. 447, 473; *Edgerly v. Shaw*, 25 N. H. (5 Fost.) 514; s. c. 57 Am. Dec. 349; *Taft v. Sergeant*, 18 Barb. (N. Y.) 320; *Ackerman v. Runyon*, 1 Hilt. (N. Y.) 169; s. c. 3 Abb. (N. Y.) Pr. 111; *Jackson v. Carpenter*, 11 Johns. (N. Y.) 542, 543; *Goodsell v. Myers*, 3 Wend. (N. Y.) 479; *Millard v. Hewlett*, 19 Wend. (N. Y.) 301; *Hoyle v. Stowe*, 2 Dev. & Bat. (N.

C.) 320; *Alexander v. Hutcheson*, 2 Hawks. (N. C.) 535; *Armfield v. Tate*, 7 Ired. (N. C.) L. 258; *Scott v. Buchanan*, 11 Humph. (Tenn.) 468; *Reed v. Boshears*, 4 Sneed (Tenn.) 118; *Wheaton v. East*, 5 Yerg. (Tenn.) 41; s. c. 26 Am. Dec. 251; *Buckner v. Smith*, 1 Wash. (Va.) 295; s. c. 1 Am. Dec. 463; *Richardson v. Boright*, 9 Vt. 368; *Stokes v. Brown*, 4 Chand. (Wis.) 89; *Tucker v. Moreland*, 35 U. S. (10 Pet.) 75, 76; bk. 9, L. ed. 345, 352.

Infant's deed to land is not void, but voidable. — *Slaughter v. Cunningham*, 24 Ala. 260; s. c. 60 Am. Dec. 463; *Harrod v. Myers*, 21 Ark. 592; s. c. 76 Am. Dec. 409; *Wallace v. Lewis*, 4 Harr. (Del.) 75; *Chapman v. Chapman*, 13 Ind. 396; *Johnson v. Rockwell*, 12 Ind. 76; *Babcock v. Doe*, 8 Ind. 110; *Moore v. Abernathy*, 7 Blackf. (Ind.) 442; *Jenkins v. Jenkins*, 12 Iowa, 195; *Phillips v. Green*, 5 T. B. Mon. (Ky.) 344; *Lowe v. Gist*, 5 Har. & J. (Md.) 106; *Kendall v. Lawrence*, 39 Mass. (22 Pick.) 540; *Worcester v. Eaton*, 13 Mass. 371, 375; s. c. 7 Am. Dec. 155; *Boston Bank v. Chamberlain*, 15 Mass. 220; *Cook v. Tounbs*, 36 Miss. 685; *Ferguson v. Bell*, 17 Mo. 347; *Merchants Fire Ins. Co. v. Grant*, 2 Edw. Ch. (N. Y.) 544; *Eagle Fire Ins. Co. v. Lent*, 1 Edw. Ch. (N. Y.) 301; *Gillet v. Stanley*, 1 Hill (N. Y.) 121; *Van Nostrand v. Wright*, *Hill & Den.* (N. Y.) 260; *Dominick v. Michael*, 4 Sandf. (N. Y.) 374; *Bool v. Mix*, 17 Wend. (N. Y.) 119; s. c. 31 Am. Dec. 285; *White v. Flora*, 2 Overt. (Tenn.) 426; *Wheaton v. East*, 5 Yerg. (Tenn.) 41; s. c. 26 Am. Dec. 251; *Cummings v. Powell*, 8 Tex. 80. In some states an infant's deed may be superseded or annulled by the mere execution of another conveyance, after he arrives of age, to a purchaser for value. See *Eagle Fire Ins. Co. v. Lent*, 6 Paige Ch. (N. Y.) 635; *Hoyle v. Stowe*, 2 Dev. & Bat. (N. C.) L. 220; *Cressemer v. Welch*, 15 Ohio, 156; *Tucker v. Moreland*,

35 U. S. (10 Pet.) 58; bk. 9, L. ed. 343. In some states it is held that where the infant has not retained possession, he must make an actual entry upon the land before such conveyance will operate. See *Harrison v. Adcock*, 8 Ga. 68; *Dominick v. Michael*, 4 Sandf. (N. Y.) 374.

Infant's sale of personal property. — Where an infant has sold his personal property and received payment for it, such sale will not be affirmed by a similar execution, after attaining majority, but any positive act on his part, clearly indicating an intention to confirm the contract, will be binding. See *Boody v. McKenney*, 23 Me. 525. Where he disaffirms the sale on attaining majority, and reclaims the property sold, he must restore the purchase money or other consideration received by him. *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113; *Boody v. McKenney*, 23 Me. 17-25; *Hubbard v. Cummings*, 1 Me. (1 Greenl.) 13; *Bartlett v. Cowles*, 81 Mass. (15 Gray) 445; *Badger v. Phinney*, 15 Mass. 363; *Hill v. Anderson*, 5 Smed. & M. (Miss.) 216; *Heath v. West*, 28 N. H. 101; *Carr v. Clough*, 26 N. H. 280; s. c. 59 Am. Dec. 345; *Bartholomew v. Finnemore*, 17 Barb. (N. Y.) 430; *Root v. Stafford*, 7 Cow. (N. Y.) 179; *Smith v. Evans*, 5 Humph. (Tenn.) 70; *Taft v. Pike*, 14 Vt. 405; *Farr v. Sumner*, 12 Vt. 28. However, it has been said that where he has wasted or spent the money during his minority, he may avoid the contract without restoring the same. *Chandler v. Simmons*, 97 Mass. 508. See, also, *Bassett v. Brown*, 105 Mass. 551, 559; *Bartlett v. Drake*, 100 Mass. 174, 177. See, also, *Gibson v. Soper*, 72 Mass. (6 Gray) 279; *Price v. Furman*, 27 Vt. 268. See, as to the equity rule, *Hillier v. Bennett*, 3 Edw. Ch. (N. Y.) 222.

Contract of suretyship made by an infant is held in some states to be against his interest and therefore void. *Maples v. Wightman*, 4 Conn.

376; s. c. 10 Am. Dec. 149. See, also, *Beeler v. Young*, 1 Bibb (Ky.) 519; *Tandy v. Masterson*, 1 Bibb (Ky.) 330; *Hardy v. Waters*, 38 Me. 450; *Nightingale v. Withington*, 15 Mass. 272; s. c. 8 Am. Dec. 101. And where regarded as voidable only, the infant must not only acknowledge his liability, after arriving at full age, but must make a deliberate and express voluntary promise to pay, with the knowledge that he is not legally liable. *Fetrow v. Wiseman*, 40 Ind. 148. See, also, *Wilcox v. Roath*, 12 Conn. 550; *Rogers v. Hurd*, 4 Day (Conn.) 57; s. c. 4 Am. Dec. 182; *Martin v. Byrom*, *Dudley* (Ga.) 303; *Conklin v. Ogborn*, 7 Ind. 553; *Deason v. Boyd*, 1 Dana (Ky.) 45; *Boody v. McKenney*, 23 Me. 517; *Thing v. Libbey*, 16 Me. 55; *Hubbard v. Cummings*, 1 Me. (1 Greenl.) 11; *Thompson v. Lay*, 21 Mass. (4 Pick.) 48; s. c. 16 Am. Dec. 325; *Ford v. Phillips*, 18 Mass. (1 Pick.) 202; *Whitney v. Dutch*, 14 Mass. 457; s. c. 7 Am. Dec. 229; *Smith v. Mayo*, 9 Mass. 60; s. c. 6 Am. Dec. 28; *Mayer v. McLure*, 36 Miss. 389; s. c. 72 Am. Dec. 190; *Hoit v. Underhill*, 10 N. H. 220; s. c. 34 Am. Dec. 148; *Hale v. Gerrish*, 8 N. H. 374; *Merriam v. Wilkins*, 6 N. H. 432; s. c. 25 Am. Dec. 472; *Bank of Silver Creek v. Browning*, 16 Abb. (N. Y.) Pr. 272; *Watkins v. Stevens*, 4 Barb. (N. Y.) 168; *Bigelow v. Grannis*, 2 Hill (N. Y.) 120; *Jackson v. Carpenter*, 11 Johns. (N. Y.) 539, 542; *Millard v. Hewlett*, 19 Wend. (N. Y.) 301; *Gay v. Ballou*, 4 Wend. (N. Y.) 403; s. c. 21 Am. Dec. 158; *Goodsell v. Myers*, 3 Wend. (N. Y.) 479; *Dunlap v. Hales*, 2 Jones (N. C.) L. 381; *Hinely v. Margaritz*, 3 Pa. St. 428; *Curtin v. Patton*, 11 Serg. & R. (Pa.) 305; *Tucker v. Moreland*, 35 U. S. (10 Pet.) 58; bk. 9, L. ed. 343; *Brooke v. Gally*, 2 Atk. 34; *Thornton v. Illingworth*, 2 Barn. & Cres. 824; *Harmer v. Killing*, 5 Esp. 102; *Thrupp v. Fielder*, 2 Esp. 628.

What constitutes a ratification.—The voidable contract of an infant may be ratified on attaining majority, by acts of recognition, acquiescence, or estoppel, as well as by express promises. See *Wilcox v. Roath*, 12 Conn. 550; *Kline v. Beebe*, 6 Conn. 494; *Rogers v. Hurd*, 4 Day (Conn.) 57; s. c. 4 Am. Dec. 182; *Proctor v. Sears*, 86 Mass. (4 Allen) 95; *Smith v. Kelley*, 54 Mass. (13 Metc.) 309; *Peirce v. Tobey*, 46 Mass. (5 Metc.) 168; *Thompson v. Lay*, 21 Mass. (4 Pick.) 48; s. c. 16 Am. Dec. 325; *Ford v. Phillips*, 18 Mass. (1 Pick.) 203; *Jackson v. Mayo*, 11 Mass. 147; *Martin v. Mayo*, 10 Mass. 137; s. c. 6 Am. Dec. 103; *Aldrich v. Grimes*, 10 N. H. 194; *Hoit v. Underhill*, 9 N. H. 439; s. c. 34 Am. Dec. 148; *Hale v. Gerrish*, 8 N. H. 374; *Merriam v. Wilkins*, 6 N. H. 432; *Orvis v. Kimball*, 3 N. H. 314; *Hodges v. Hunt*, 22 Barb. (N. Y.) 150; *Bigelow v. Grannis*, 2 Hill (N. Y.) 120; *Gay v. Ballou*, 3 Wend. (N. Y.) 403; s. c. 21 Am. Dec. 158; *Millard v. Hewlett*, 19 Wend. (N. Y.) 301, 302; *Morrill v. Aden*, 19 Vt. 505. And every voidable contract which is not disaffirmed within a reasonable time after becoming of full age will be binding. *Wright v. Germain*, 21 Iowa, 585; *Deason v. Boyd*, 1 Dana (Ky.) 45; *Jones v. Butler*, 30 Barb. (N. Y.) 641; *Flynn v. Powers*, 35 How. (N. Y.) Pr. 279; *Richardson v. Boright*, 9 Vt. 368. Thus, where an infant has purchased property on credit, and after attaining majority retains it for an unreasonable length of time, he thereby ratifies the contract and becomes liable for the purchase price. *Deason v. Boyd*, 1 Dana (Ky.) 45; *Boody v. McKenney*, 23 Me. 517; *Thing v. Libbey*, 16 Me. 55; *Lawson v. Lovejoy*, 8 Me. (8 Greenl.) 405; *Smith v. Kelley*, 54 Mass. (13 Metc.) 309; *Boyden v. Boyden*, 50 Mass. (9 Metc.) 519; *Robbins v. Eaton*, 10 N. H. 561; *Aldrich v. Grimes*, 10 N. H. 194; *Eubanks v. Peak*, 2 Bailey (S. C.) L. 497, 499; *Alexander v. Heriot*,

1 Bailey (S. C.) Eq. 223; *Cheshire v. Barrett*, 4 McCord (S. C.) L. 241. And an infant's voidable deed may be ratified on attaining majority, by any act for that express purpose, or by such a course of conduct as necessarily excludes a contrary supposition. *Kline v. Beebe*, 6 Conn. 494; *Wimberly v. Jones*, 1 Ga. Dec. 91; *Hartman v. Kendall*, 4 Ind. 403; *Boody v. McKenney*, 23 Me. 517; *Levering v. Heighe*, 2 Md. Ch. 81; *Emmons v. Murray*, 16 N. H. 385; *Williams v. Mabree*, 7 N. J. Eq. (3 Halst.) 500; *Summers v. Wilson*, 2 Coldw. (Tenn.) 469; *Wheaton v. East*, 5 Yerg. (Tenn.) 41; s. c. 26 Am. Dec. 25.

But the promise to pay must be unconditional; if conditioned on the happening of a certain event, it must be shown that that event has occurred. *Everson v. Carpenter*, 17 Wend. (N. Y.) 419.

Disaffirming contract: Restoration of consideration.—A minor on attaining majority may avoid his contract by any act clearly showing an intention to do so. *Shipman v. Horton*, 17 Conn. 481; *Walker v. Ellis*, 12 Ill. 470; *Moore v. Abernathy*, 7 Blackf. (Ind.) 442; *Carr v. Clough*, 26 N. H. (6 Fost.) 280; s. c. 59 Am. Dec. 345; *Heath v. West*, 26 N. H. (6 Fost.) 191; *Grace v. Hale*, 2 Humph. (Tenn.) 27; s. c. 36 Am. Dec. 296. It is the general doctrine that where an infant disaffirms a sale that he has made, and reclaims the property, he must restore or offer to restore the purchase price or other consideration. *Strain v. Wright*, 7 Ga. 568; *Bailey v. Barnberger*, 11 B. Mon. (Ky.) 113; *Hubbard v. Cummings*, 1 Me. (1 Greenl.) 13; *Bartlett v. Cowles*, 81 Mass. (15 Gray) 445; *Badger v. Phinney*, 15 Mass. 363; *Hill v. Anderson*, 5 Smed. & M. (Miss.) 216; *Heath v. West*, 28 N. H. 101; *Carr v. Clough*, 26 N. H. 280; s. c. 59 Am. Dec. 345; *Bartholomew v. Finnemore*, 17 Barb. (N. Y.) 430; *Kitchen v. Lee*, 11 Paige Ch.

but only in writing.² By the 9 Geo. IV. c. 14, s. 5 (usually called Lord Tenterden's Act), it was provided, "that no action shall be maintained whereby to charge any person upon any *promise made after full age*, to pay any debt contracted during infancy, or upon ratification after full age, of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith."³

The legal interpretation of the words (also used in the Statute of Frauds), "some writing signed by the party to be charged therewith," is treated of in Part II. Ch. VI. of this Book. On the question of the sufficiency of the words used in the written promise to satisfy the requirement of the statute, Rolfe B. in delivering the judgment of the Exchequer of Pleas in *Harris v. Wall*,⁴ held, that the Act distinguished between a *new promise* and a *ratification*; and in the case before the Court, the defendant was held liable on the letters

(N. Y.) 107; *Oltman v. Moak*, 3 Sandf. Ch. (N. Y.) 431; *Smith v. Evans*, 5 Humph. (Tenn.) 70; *Kilgore v. Jordan*, 17 Tex. 341; *Taft v. Pike*, 14 Vt. 405; *Farr v. Sumner*, 12 Vt. 28. However, it seems otherwise in those cases where the infant has wasted or spent the consideration money. *Bartlett v. Drake*, 100 Mass. 174, 177; s. c. 1 Am. Rep. 101; *Chandler v. Simmons*, 97 Mass. 508. See, also, *Bassett v. Brown*, 105 Mass. 551, 559; *Gibson v. Soper*, 72 Mass. (6 Gray) 279; *Price v. Furman*, 27 Vt. 268. See *White v. Branch*, 51 Ind. 210; *Carpenter v. Carpenter*, 45 Ind. 142; *Ruchizky v. DeHaven*, 97 Pa. St. 202.

Avoidance as to third person.—A right of an infant to avoid a sale may be exercised against a *bonâ fide* purchaser for value. *Myers v. Sander's Heirs*, 7 Dana (Ky.) 506; *Hill v. Anderson*, 5 Smed. & M. (Miss.) 216, 224. But see *Carr v. Clough*, 26 N. H. 280; s. c. 59 Am. Dec. 345. However, in all cases the ratification must take place before action is brought. *Thing v. Libbey*, 16 Me.

55, 57; *Smith v. Kelley*, 54 Mass. (13 Metc.) 309; *Goodridge v. Ross*, 47 Mass. (6 Metc.) 487, 490; *Aldrich v. Grimes*, 10 N. H. 194; *Hale v. Gerish*, 8 N. H. 374;⁵ *Conn v. Coburn*, 7 N. H. 368; *Merriam v. Wilkins*, 6 N. H. 432; *Thornton v. Illingworth*, 2 Barn. & C. 824.

² *Acknowledgment in writing*, after attaining majority, is necessary to bind an infant on a contract under the statutes of Kentucky, Maine, New Jersey, and perhaps other states. See *Bonney v. Reardin*, 6 Bush (Ky.) 34, 40; *Thurlow v. Gilmore*, 40 Me. 378, 380. But in a majority of the states a parol ratification is sufficient. *Hoit v. Underhill*, 10 N. H. 220; s. c. 34 Am. Dec. 148; *Orvis v. Kimball*, 3 N. H. 314.

³ Similar statutes have been passed in some of the American states. See *Fetrow v. Wiseman*, 40 Ind. 148; *Turner v. Gaither*, 83 N. C. 357; s. c. 35 Am. Rep. 574; *Hinely v. Margaritz*, 3 Pa. St. 423; *Curtin v. Palton*, 11 Serg. & R. (Pa.) 315.

⁴ 1 Ex. 122. See *Mawson v. Blane*, 10 Ex. 206; *ante*, § 33, note 1.

written by him, as amounting to a ratification, though not a new promise. And the test of a ratification was given in these words: "Any written instrument which in the case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification." In the report of that case, the reader will find all the previous cases cited and reviewed in the arguments of the counsel.⁵

§ 34. But the writing must do more than merely acknowledge the correctness of an account as set forth, and the satisfaction of the party with the prices charged. It must further contain something to recognize the contract as an *existing liability*, in order to constitute a ratification. On this principle *the Queen's Bench in *Rowe v. Hopwood*¹ [*30] held insufficient to bind the defendant his signature to a writing at the foot of the account in these words: "Particulars of account to end of year 1867, amounting to 162l. 11s. 6d., I certify to be correct and satisfactory." Nothing in the words indicated the intention to pay the account, or to admit it as an existing liability.²

§ 35. [However, sect. 5 of 9 Geo. IV. c. 14, has now been repealed by the Statute Law Revision Act, 1875 (38 and 39 Vict. c. 66); and by the Infants' Relief Act, 1874 (37 and 38 Vict. c. 62) it is provided, by the 1st section that, "All contracts whether by specialty or by simple contract henceforth entered into by infants for the repayment of money lent or

⁵ *Hartley v. Wharton*, 11 A. & E. 934; *Hunt v. Massey*, 5 B. & Ad. 902; *Lobb v. Stanley*, 5 Q. B. 574; *Williams v. Moor*, 11 M. & W. 256; *Cohen v. Armstrong*, 1 M. & S. 724; *Tanner v. Smart*, 6 B. & C. 603; *Whipsey v. Hillary*, 3 B. & Ad. 399; *Routledge v. Ramsay*, 8 A. & E. 221.

¹ L. R. 4 Q. B. 1.

² *Promissory note: ratification.* — The promissory note of an infant is void, not voidable. *Buzzell v. Bennett*, 2 Cal. 101; *Best v. Givens*, 3 B. Mon. (Ky.) 72; *Earle v. Reed*, 51

Mass. (10 Metc.) 387; *Reed v. Batchelder*, 42 Mass. (1 Metc.) 559; *Wright v. Steele*, 2 N. H. 51; *Everson v. Carpenter*, 17 Wend. (N. Y.) 419; *Goodsell v. Myers*, 3 Wend. (N. Y.) 479; *Young v. Bell*, 1 Cr. C. C. 342. But an acknowledgment that he owes the debt, or a part payment, after he becomes of age, is not a ratification of the promise to pay the note. *Benham v. Bishop*, 9 Conn. 330; *Smith v. Kelley*, 54 Mass. (13 Metc.) 310; *Robbins v. Eaton*, 10 N. H. 561; *Hinely v. Margaritz*, 3 Pa. St. 428.

to be lent, or *for goods supplied or to be supplied* (other than contracts for necessities), and all accounts stated with infants, shall be *absolutely void*: provided always that this enactment shall not invalidate any contract into which an infant may by an existing or future statute, or by the rules of common law or equity, enter, except such as now by law are avoidable."

And by the 2d section that, "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

The 2d section has been held to apply to a ratification after the passing of the Act of a contract made during infancy before it.¹ It would probably also be held that a ratification could not be used as a set-off.² The *ratio decidendi* of *Rawley v. Rawley*, which was decided under 9 Geo. IV. c. 14, s. 5, was that a set-off under the Statutes of Set-Off must be of an actionable debt; and that the debt in that case, [*31] not having been ratified in writing so as to * comply with the provisions of the statute, and therefore, not being actionable, could not be used by way of set-off.

Mr. Pollock points out in his work on Contracts (3d ed. at p. 62), that the expression contracts "for goods supplied or to be supplied" is not free from obscurity. Had the words been instead "*for payment for goods supplied, &c.*" the meaning would have been clear. No cases illustrating the operation of the Act upon sales and purchases of goods³ have been met with in the reports, but from a consideration of its language, the effect of the Act with reference to this class of contracts seems to be as follows:—

When the infant is *the purchaser* (except where he contracts for the purchase of necessities) by the 1st section the

¹ *Ex parte Kibble*, 10 Ch. 373.

² *Rawley v. Rawley*, 1 Q. B. D. 460, C. A.

³ See *Coxhead v. Mullis*, 3 C. P. D.

439; *Northcote v. Doughty*, 4 C. P. D.

385; *Ditcham v. Worrall*, 5 C. P. D.

410; all cases of breach of promise of marriage.

contract is absolutely void; it follows therefore that the 2d section is superfluous.

When the infant is *the seller* the 1st section seems to have no application, and the legal effect of the contract remains the same as it was at common law before the Act, *i.e.* it is voidable at the infant's option, and he may adopt and enforce it upon attaining his majority, or even before.⁴ But the 2d section, where the words "*No action shall be brought* whereby to charge any person" are to be observed, will have the effect of protecting the infant seller against an action by the purchaser, although the infant may have ratified the contract after reaching full age.⁵]

§ 36. As to *lunatics* and persons *non compotes mentis*, the rules of law regulating their capacity to purchase do not differ materially from those which govern such contracts when made by infants.¹ There is no doubt that it is competent for the lunatic or his representatives to show that when he made the purchase his mind was so deranged that he did not know nor understand what he was doing.² Still, if that state of mind, though really existent, be unknown to the other party, and no advantage be taken of the lunatic, the defence cannot * prevail; especially where the contract [*32] is not merely executory, but executed in the whole

⁴ *Warwick v. Bruce*, 2 M. & S. 205.

⁵ *Sale by infant* is void where no delivery is made (*Chapin v. Schafer*, 49 N. Y. 407, 412; *Stafford v. Roof*, 9 Cow. (N. Y.) 626; *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631; s. c. 30 Am. Dec. 77); and voidable where there has been a delivery. *Williams v. Brown*, 34 Me. 594; *Thompson v. Hamilton*, 29 Mass. (12 Pick.) 425; s. c. 23 Am. Dec. 619; *Whitney v. Dutch*, 14 Mass. 457; s. c. 7 Am. Dec. 229; *Oliver v. Houdlet*, 13 Mass. 237; s. c. 7 Am. Dec. 134; *Baker v. Lovett*, 6 Mass. 78; s. c. 4 Am. Dec. 88; *Miller v. Smith*, 26 Minn. 248; *Cogle v. Cushman*, 16 Minn. 401; *Chapin v. Schafer*, 49 N. Y. 407; *Stafford v. Roof*, 9 Cow. (N. Y.) 626. See, also, § 33, note 1. On avoiding the

contract the infant may recover the chattel sold, but only on condition that he restore the consideration, where it lies in his power. See *Disaffirmance: Restoration of consideration*, ante, § 33, note 1. If he cannot restore the consideration he may still recover. *Carpenter v. Carpenter*, 45 Ind. 142; *Chandler v. Simmons*, 97 Mass. 508; *Betts v. Carroll*, 6 Mo. App. 518; *Price v. Furman*, 27 Vt. 268.

¹ *Hallett v. Oakes*, 55 Mass. (1 Cush.) 298; *Kendall v. May*, 92 Mass. (10 Allen) 67.

² *McCarty v. Kerman*, 86 Ill. 291; *Titcomb v. Vantyle*, 84 Ill. 371; *Molton v. Camroux*, 2 Ex. 487; in error, 4 Ex. 17.

or in part, and the parties cannot be restored altogether to their original position. In the case cited in the note, all the authorities will be found quoted and examined.³

So far as relates to supplies of necessities to a person of unsound mind, there can be no question that where no advantage is taken of his condition by the vendor, the purchase will be held valid.⁴

³ *Molton v. Camroux*, 2 Ex. 487; and in error, 4 Ex. 17. See, also, *Niell v. Morley*, 9 Ves. 478; *Beavan v. M'Donnell*, 9 Ex. 309.

American authorities.—*Fay v. Burditt*, 81 Ind. 433; *Abbott v. Creal*, 56 Iowa, 175; *Rusk v. Fenton*, 14 Bush (Ky.) 490; *Barnes v. Hathaway*, 66 Barb. (N. Y.) 452; *Mutual Life Insurance Co. v. Hunt*, 14 Hun (N. Y.) 169; *McDonald v. McDonald*, 14 Grant (Ont.) 545; *Campbell v. Hill*, 23 Up. Can. C. P. 473.

Contracts with lunatics are voidable, and not void. *Crowther v. Rowlandson*, 27 Cal. 376; *Maddox v. Simmons*, 31 Ga. 512; *Somers v. Pumphrey*, 24 Ind. 231; *Cates v. Woodson*, 2 Dana (Ky.) 452; *Breckenridge v. Ormsby*, 1 J. J. Marsh (Ky.) 236; s. c. 19 Am. Dec. 71; *Hovey v. Hobson*, 53 Me. 451; *Arnold v. Richmond Iron Works*, 67 Mass. (1 Gray) 434; *Allis v. Billings*, 47 Mass. (6 Metc.) 415; s. c. 39 Am. Dec. 744; *Fitzgerald v. Reed*, 17 Miss. (9 Smed. & M.) 94; *Ingraham v. Baldwin*, 9 N. Y. 45; *Cook v. Parker*, 4 Phila. (Pa.) 265. And such as are fairly made, for necessities or things suitable to their condition and habits of life, will be sustained. *Ex parte Northington*, 37 Ala. 496; s. c. 1 Ala. Sel. Cas. 400; 79 Am. Dec. 67; *Pearl v. McDowell*, 3 J. J. Marsh (Ky.) 658; s. c. 20 Am. Dec. 199; *Skidmore v. Romaine*, 2 Bradf. (N. Y.) 122; *Richardson v. Strong*, 13 Ired. (N. C.) L. 106; s. c. 55 Am. Dec. 430. An executed contract, where the parties have been dealing fairly, and in ignorance of the lunacy, if no undue advantage

has been taken, will not be set aside. *Carr v. Holliday*, 1 Dev. & Bat. (N. C.) Eq. 344; *Sims v. McLure*, 8 Rich. (S. C.) Eq. 286; s. c. 70 Am. Dec. 196; *Ballard v. McKenna*, 4 Rich. (S. C.) Eq. 358; *Dodds v. Wilson*, 1 Treadw. (S. C.) Const. 448; *Elliot v. Ince*, 7 De G., M. & G. 475. It is said in the case of *Elliot v. Ince*, *supra*, that "the result of the authorities seems to be, that dealings of sale and purchase by a person apparently sane, though subsequently found to be insane, will not be set aside against those who have dealt with him on the faith of his being a person of competent understanding." See *McCormick v. Littler*, 85 Ill. 62; *Carr v. Holliday*, 5 Ired. (N. C.) Eq. 167; *Lincoln v. Buckmaster*, 32 Vt. 652; *Manning v. Gill*, L. R. 13 Eq. 485. But it has been held that where one contracts with a lunatic, and under such contract furnishes him with money and renders him services which, however, prove of no benefit to him, he cannot recover of the lunatic therefor, even though he, in good faith, supposed him to be sane, provided such circumstances were known to him, in regard to the mental condition, as where sufficient to convince a reasonable and prudent man of his insanity, or even to put him on an inquiry by which he might, if reasonably prudent, have ascertained the fact. *Lincoln v. Buckmaster*, 32 Vt. 652. See, also, *Seaver v. Phelps*, 28 Mass. (11 Pick.) 304; s. c. 22 Am. Dec. 372.

⁴ *Marby v. Scott*, 1 Sid. 112; *Lane v. Kirkwall*, 8 C. & P. 679; *Went-*

§ 37. A *drunkard*, when in a state of complete intoxication, so as not to know what he is doing, has no capacity to contract in general,¹ but he would be liable for absolute nec-

worth *v. Tubb*, 1 Y. & C. (N. C.) 171; *Nelson v. Duncombe*, 9 Beav. 211; *Baxter v. Earl of Portsmouth*, 5 B. & C. 170; but see *In re Weaver*, 21 Ch. D. 615, C. A.

American authorities. — *Sawyer v. Lufkin*, 56 Me. 308; *Hallett v. Oakes*, 55 Mass. (1 Cush.) 296, 298; *Seaver v. Phelps*, 28 Mass. (11 Pick.) 304, 307; *Fitzgerald v. Reed*, 9 Smed. & M. (Miss.) 94; *McCrillis v. Bartlett*, 38 N. H. 569; *Richardson v. Strong*, 13 Ired. (N. C.) L. 106.

Necessaries for lunatics. — Contracts for necessaries for lunatics, suited to their condition and habits of life, will be binding. *Ex parte Northington*, 37 Ala. 496; s. c. 69 Am. Dec. 67; 1 Ala. Sel. Cas. 400; *Crowther v. Rowlandson*, 27 Cal. 376; *Maddox v. Simmons*, 31 Ga. 512; *Pearl v. McDowell*, 3 J. J. Marsh (Ky.) 658; s. c. 20 Am. Dec. 199; *Fitzgerald v. Reed*, 17 Miss. (9 Smed. & M.) 94; *Van Horne v. Hann*, 39 N. J. L. (10 Vr.) 207; *Skidmore v. Romaine*, 2 Bradf. (N. Y.) 122; *Richardson v. Strong*, 13 Ired. (N. C.) L. 106; s. c. 55 Am. Dec. 430.

What are necessaries. *In re Persse*, 3 Molloy, 94, it said: "The maintenance of a lunatic is not limited as an infant's is, within the bounds of his income. It is not limited except by the fullest comforts of the lunatic. Fancied enjoyments and even harmless caprice are to be indulged up to the limits of income, and for solid enjoyments and substantial comforts the court will, if necessary, go beyond the limits of income. In this commonwealth it is not thus limited in respect to an infant, and there is, therefore, less reason for limiting it in respect to a person of full age." *In Kendall v. May*, 92 Mass. (10 Allen) 59, it was held that: "Where the

guardian of an insane person has been removed, and no new guardian appointed, one who takes such person upon a journey for pleasure outside of the 'commonwealth at the insane person's request, may recover from him the expenses therefor, if the jury find them reasonable and proper."

Executed contracts with a lunatic made before the appointment of a committee in lunacy are valid, where no undue advantage is taken of him. *Sims v. McLure*, 8 Rich. (S. C.) Eq. 286; s. c. 70 Am. Dec. 196; *Dodds v. Wilson*, 1 Treadw. (S. C.) Const. 448. See *Crouse v. Holman*, 19 Ind. 30; *Holland v. Miller*, 12 La. An. 624. And where a sale of goods has been made to such a person, under such circumstances, it cannot be avoided unless fraud or a knowledge of his actual insanity is shown. *McCormick v. Littler*, 85 Ill. 62; s. c. 28 Am. Rep. 610; *Matthiessen v. McMahon*, 38 N. J. L. (9 Vr.) 536; *Riggs v. Amer. Tract Soc.*, 84 N. Y. 330; *Mutual Life Ins. Co. v. Hunt*, 79 N. Y. 541; *Lancaster County Bank v. Moore*, 7 Pa. St. 407; s. c. 21 Am. Rep. 24; *Beals v. See*, 10 Pa. St. 56; s. c. 49 Am. Dec. 573.

¹ *Molton v. Camroux*, *ubi supra*; *Pitt v. Smith*, 3 Camp. 33; *Fenton v. Holloway*, 1 Stark. 126; *Gore v. Gibson*, 13 M. & W. 623; *Cook v. Clayworth*, 18 Ves. Jr. 12.

American authorities. — *Drummond v. Hopper*, 4 Harr. (Del.) 327; *Hutchinson v. Brown*, 1 Clark (Pa.) 408; *White v. Cox*, 4 Hayw. (Tenn.) 213; *King v. Bryant*, 2 Hayw. (N. C.) L. 394; *Taylor v. Patrick*, 1 Bibb (Ky.) 168; *Harbison v. Lemon*, 3 Blackf. (Ind.) 51; s. c. 23 Am. Dec. 376; *Reinicker v. Smith*, 2 Harr. & J. (Md.) 421; *Foss v. Hildreth*, 92 Mass. (10 Allen) 76, 79; *Walker v. Davis*, 67 Mass. (1 Gray) 506, 508;

essaries supplied to him while in that condition; and Pollock C. B. put the ground of the liability as follows: "A contract may be implied by law in many cases, even where the party protested against any contract. The law says he did contract, because he ought to have done so. On that ground the creditor might recover against him when sober, for necessities supplied to him when drunk."²

Broadwater v. Darne, 10 Mo. 277; *Seymour v. Delancy*, 3 Cow. (N. Y.) 445; s. c. 15 Am. Dec. 270; *Dorr v. Munsell*, 13 John. (N. Y.) 430; *Prentice v. Achorn*, 2 Paige Ch. (N. Y.) 30; *Burroughs v. Richman*, 13 N. J. L. (1 Gr.) 233; s. c. 23 Am. Dec. 717; *Curtis v. Hall*, 4 N. J. L. (1 South.) 361; *French v. French*, 8 Ohio, 214; s. c. 31 Am. Dec. 441; *Duncan v. McCullough*, 4 Serg. & R. (Pa.) 484; *Clark v. Caldwell*, 6 Watts (Pa.) 139; *Rutherford v. Ruff*, 4 Desau. (S. C.) Eq. 364; *Wigglesworth v. Steers*, 1 Hen. & Munf. (Va.) 70; s. c. 3 Am. Dec. 602; *Foot v. Tewksbury*, 2 Vt. 97; *Barrett v. Buxton*, 2 Aiken (Vt.) 167; s. c. 16 Am. Dec. 691; *Lazell v. Pinnick*, 1 Tyler (Vt.) 247; s. c. 4 Am. Dec. 722; *Reynolds v. Waller*, 1 Wash. (Va.) 164.

² *Gore v. Gibson*, *ubi supra*. See *McCrillis v. Bartlett*, 8 N. H. 569; *Richard v. Strong*, 13 Ired. (N. C.) L. 106.

Contract by intoxicated person.—It is well settled in this country that if a person at the time of entering into a contract is so intoxicated as to be without a contracting mind, his contract will be avoided in equity at the notice of such intoxicated party. *Wade v. Colvert*, 2 Mill (S. C.) 27; s. c. 12 Am. Dec. 652; *Woodson v. Gordon*, Peck. (Tenn.) 196; s. c. 14 Am. Dec. 743; *Wigglesworth v. Steers*, 1 Hen. & Munf. (Va.) 70; s. c. 3 Am. Dec. 602. Mental incapacity at the time of contracting, produced by excessive use of intoxicating liquors, is a good defence against a contract, whether it be by deed or

parol. *Jenners v. Howard*, 6 Blackf. (Ind.) 240.

Intoxication.—The contract will be set aside although such intoxication was voluntary and in no wise attributable to the other party. See *Warnock v. Campbell*, 25 N. J. Eq. (10 C. E. Gr.) 485; *French v. French*, 8 Ohio, 214; s. c. 31 Am. Dec. 441; *Barrett v. Buxton*, 2 Aik. (Vt.) 167; s. c. 16 Am. Dec. 691. Such contract however is only voidable, not absolutely void, and may be ratified when sober. *Carpenter v. Rogers*, 59 Mich. And where a person has been placed under the care of a committee as an habitual drunkard, he cannot in his sober moments make contracts to bind himself or his property. *Wadsworth v. Sharpsteen*, 8 N. Y. 388; s. c. 59 Am. Dec. 490; *Imhoff v. Whitmer*, 31 Pa. St. 243. And where a contract is entered into by a person in a state of intoxication, it may, after his death, be avoided by his legal representatives. *Wigglesworth v. Steers*, 1 Hen. & Munf. (Va.) 70; s. c. 3 Am. Dec. 602. See *Reynolds v. Waller*, 1 Wash. (Va.) 164.

In New Hampshire, where a complaint has been made to the judge of the probate court under the statutes, by the selectmen of the town, setting forth that an individual, by excessive drinking and idling, is wasting his estate, etc., and praying that a guardian may be appointed; and a copy of the complaint and order of notice thereon has been filed with the clerk of the town in which he resides, pursuant to the statute, a contract made by him, pending such action, will not

[But a contract entered into by a person who is so drunk as not to know what he is doing, is *voidable* only and not void, and may therefore be ratified by him when he becomes sober.³

§ 38. A *married woman* is at common law absolutely incompetent to enter into contracts during coverture: in contemplation of law she has no separate existence, her husband and herself forming but one person.¹ She cannot even, while living apart from her husband and enjoying a separate *maintenance secured by deed, make a [*33] valid purchase on her own account, even for necessities, and when credit is given to her there is no remedy but an appeal to her honor.² The contract with her was not, as in the case of an infant voidable only, but absolutely void, and therefore incapable of ratification after her coverture had ceased.³

be binding, if a guardian is afterwards appointed on such complaint. *McCrillis v. Bartlett*, 8 N. H. 569. See *Manson v. Felton*, 30 Mass. (13 Pick.) 206; *Smith v. Spooner*, 20 Mass. (3 Pick.) 229.

³ *Matthews v. Baxter*, L. R. 8 Ex. 132, where the use of the word "void" in *Gore v. Gibson*, *ubi supra*, is commented on.

American authorities.—*Foss v. Hildreth*, 92 Mass. (10 Allen) 76, 79; *Warnock v. Campbell*, 25 N. J. Eq. (10 C. E. Gr.) 485; *Van Wyck v. Brasher*, 81 N. Y. 260; *French v. French*, 8 Ohio, 214.

Where there has been an inquest finding a man to be a habitual drunkard, such finding is only *prima facie* evidence of incapacity before such finding, but conclusive thereafter. *Kohls v. Kohls*, 61 Pa. St. 245; *Leckey v. Cunningham*, 56 Pa. St. 370; *Noel v. Karper*, 53 Pa. St. 97; *Imhoff v. Witmer*, 31 Pa. St. 243; *In re Gangwere's Estate*, 14 Pa. St. 417, 428; s. c. 53 Am. Dec. 554; *Rogers v. Walker*, 6 Pa. St. 371; s. c. 47 Am. Dec. 470; *Hutchinson v. Sandt*, 4

Rawle (Pa.) 234; s. c. 26 Am. Dec. 127; *Sergeson v. Sealey*, 2 Atk. 412.

¹ *Johnston v. Jones*, 12 B. Mon. (Ky.) 326; *Stephenson v. Osborne*, 41 Miss. 119; *Young v. Paul*, 10 N. J. Eq. (2 Stock.) 401; *Jacobs v. Featherstone*, 6 Watts & S. (Pa.) 346; *Dorrance v. Scott*, 3 Wharf. (Pa.) 309. *Co. Littleton*, 112, d.

² *Marshall v. Rutton*, 8 T. R. 545.

³ *Zouch v. Parsons*, 3 Burr. 1794, 1805; *Com. Dig. Baron & Feme* (W.).

American authorities.—*Howe v. Wildes*, 34 Me. 566; *Pond v. Carpenter*, 12 Minn. 430; *Mallett v. Parham*, 52 Miss. 922; *Blake v. Hall*, 57 N. H. 373; *Eaton v. George*, 40 N. H. 259; *Pippen v. Wesson*, 74 N. C. 437; *Walker v. Simpson*, 7 Watts & S. (Pa.) 83.

Purchase of necessities.—A married woman may purchase necessities on the credit of her husband, if he neglects to provide them. *Rea v. Durkee*, 25 Ill. 503; *Eames v. Sweetser*, 101 Mass. 78; *Clark v. Cox*, 32 Mich. 204; *Hultz v. Gibbs*, 66 Pa. St. 360; *Jolly v. Rees*, 15 C. B. (N. S.) 628; followed by the House of Lords

§ 39. The common law exceptions to the general and very rigid rule as to the incapacity of a married woman to bind herself as purchaser are well defined. The first is, when the husband is *civiliter mortuus*, dead in law, as when he is under sentence of penal servitude, or transportation, or banishment.¹ The disability of the wife in such cases is said to

in *Debenham v. Mellon*, L. R. 5 Q. B. Div. 394; *Seaton v. Benedict*, 5 Bing. 28; s. c. 2 Smith Lead. Cas. 439.

¹ *Ex parte Franks*, 7 Bing. 762; *Sparrow v. Caruthers*, cited in n., 1 T. R. p. 6; *De Gaillon v. L'Aigle*, 1 B. & P. 357.

See, also, *Lady Belknap's Case*, Year-book, 2 Hen. IV. f, a; 1 Hen. IV. 1, pl. 12; *Bac. Abr. Baron and Feme*, (M.); *Lean v. Schutz*, 2 W. Bl. 1197, 1199; *Marsh v. Hutchinson*, 2 Bos. & Pull. 231; 2 *Roper's Law of Husband and Wife*, 121. See *Cornwall v. Hoyt*, 7 Conn. 420; *Troughton v. Hill*, 2 Hayw. (N. C.) 406; *Wright v. Wright*, 2 Desaus. (S. C.) 244.

When married woman may trade as a feme sole. — The Supreme Court of the United States say in *Rhea v. Rhenner*, 26 U. S. (1 Pet.) 105; bk. 7, L. ed. 72, that "the law seems to be settled, that when the wife is left without maintenance or support, by the husband, has traded as a *feme sole* and has obtained credit as such, she ought to be liable for her debts. And the law is the same, whether the husband is banished for his crimes, or has voluntarily abandoned the wife. It is for the benefit of the *feme covert*, that she should be answerable for her debts, and liable to an action in such a case; otherwise she could not obtain credit, and would have no means of gaining a livelihood. A decision to this effect, by the Court of Common Pleas, in England, is reported in 1 Bos. & Pull. (*Leader v. Danvers*) 359. In delivering the opinions of the court, Mr. Justice Buller refers to the case of *Lady Belknap*, whose husband was exiled. She was permitted to sue in her own name. The hus-

band of *Lady Sandys* was banished by an act of Parliament during life; and it was decreed in her case, that she might, in all things, act as a *feme sole*, and as if her husband was dead; and that the necessity of the case required that she should have such power. *Anonymous*, 1 Vern. 104. And the same reason applying where the husband had abjured the realm, the wife, in that case, was allowed to sue as a widow for her dower. In such case she has been permitted to alien her land without her husband, and is exempted from the disabilities of coverture. It has been uniformly considered that banishment or abjuration is a civil death of the husband." See *Gregory v. Paul*, 15 Mass. 31; reviewing the cases on this subject and citing *Eliza Wilmot's Case*, *Moore*, 351; *Dubois v. Hole*, 2 Vern. 613; *Countess of Portland v. Progers*, 2 Vern. 104; *Derry v. The Duchess of Mazarine*, 1 Ld. Raym. 147; *Ringstead v. Lady Lanesborough*, Co. Bl. L. 24; *Barwell v. Brooks*, Co. B. L. 28; *Corbett v. Poelnitz*, 1 T. R. 8; *Marshall v. Rutton*, 8 D. & E. 545; *Lean v. Schutz*, 2 W. Black. 1195; *Newsome v. Bowyer*, 3 Pr. Wm. 37; *De Gaillon v. L'Aigle*, 1 Bos. & Pull. 357; *Walford v. The Duchess of Pienne*, 2 Esp. 554; and see *Franks v. The Duchess de Pienne*, 2 Esp. 587; *Burfield v. The Duchess de Pienne*, 2 Bos. & Pull. N. R. 380; *Kay v. The Duchess de Pienne*, 3 Camp. 123; *Hookham v. Chambers*, 3 Brod. & Bing. 92; *Carroll v. Blencow*, 4 Esp. 27; *Bogget v. Frier*, 11 East, 150; Co. Lit. 132 a. However, the mere temporary absence of a husband, or a separate maintenance, or a living

be suspended, for her own benefit, that she may be able to procure a subsistence. She may therefore bind herself as purchaser, when her husband, a convict sentenced to transportation, has not yet been sent away,² and also when he remains away after his sentence has expired.³ But not if he abscond and go abroad in order to avoid a charge of felony.⁴

§ 40. It was held in some early cases that where a woman's husband was an alien, and resided abroad, and she lived in England, and contracted debts here, she was liable; Lord Kenyon, in one case, putting the decision "on the principle of the old common law, where the husband had abjured the realm."¹ But this principle was held not to apply to the case of Englishmen who voluntarily abandoned the country.² More modern cases seem to throw very strong doubt on the earlier doctrine as regards the capacity of a woman, whose husband is an alien, residing abroad, to * con- [*34]

apart of the wife, will not enable her to sue or subject her to be sued alone. *Robinson v. Reynolds*, 1 Aik. (Vt.) 174. Where the husband is *civilitur mortuus*, as where he has abjured the realm, been banished, or exiled, his wife may sue or be sued as a *feme sole*. *Robinson v. Reynolds*, 1 Aik. (Vt.) 174. And the same is true where the husband is an alien, and has never resided in this country. *Robinson v. Reynolds*, 1 Aik. (Vt.) 174.

² *Ex parte Franks*, 7 Bing. 762.

³ *Carroll v. Blencow*, 4 Esp. 27.

⁴ *Williamson v. Dawes*, 9 Bing. 292.

American authorities. — *Smith v. Silence*, 4 Iowa, 321; *Gregory v. Paul*, 15 Mass. 31; *Rhea v. Rhenner*, 26 U. S. (1 Pet.) 105, 108; bk. 7, L. ed. 72; *Williamson v. Dawes*, 9 Bing. 292.

¹ *Walford v. Duchesse de Pienne*, 2 Esp. 553; *Franks v. De Pienne*, 2 Esp. 587; *Burfield v. De Pienne*, 2 B. & P. N. R. 380; *De Gaillon v. L'Aigle*, *ubi supra*.

Abandonment by husband enables a married woman to trade as a feme sole

while such abandonment lasts. *Mead v. Hughe*, 15 Ala. 141; s. c. 50 Am. Dec. 123; *Tobin v. Galvin*, 49 Cal. 34; *Lawrence v. Spear*, 17 Cal. 421; *Ahern v. Easterby*, 42 Conn. 546; *Moore v. Stevenson*, 27 Conn. 14; *Hazelbaker v. Goodfellow*, 64 Ill. 238; *Love v. Moynehan*, 16 Ill. 277; s. c. 63 Am. Dec. 306; *Abshire v. Mather*, 27 Ind. 381; *Smith v. Silence*, 4 Iowa, 321; s. c. 66 Am. Dec. 137; *Stith v. Patterson*, 3 Bush (Ky.) 132; *Abbot v. Bayley*, 23 Mass. (6 Pick.) 89; *Gregory v. Paul*, 15 Mass. 31; *Coughlin v. Ryan*, 43 Mo. 99; *Rose v. Bates*, 12 Mo. 32; *Harrison v. Stewart*, 18 N. J. Eq. (3 C. E. Gr.) 451; *Wilson v. Brown*, 13 N. J. Eq. (2 Beas.) 277; *Osborn v. Nelson*, 59 Barb. (N. Y.) 375; *Benadum v. Pratt*, 1 Ohio St. 403; *Black v. Tricker*, 59 Pa. St. 13; *Spier's Appeal*, 26 Pa. St. 233; *Frary v. Booth*, 37 Vt. 78; *Rhea v. Rhenner*, 26 U. S. (1 Pet.) 107; bk. 7, L. ed. 72.

² *Farrar v. Countess of Granard*, 1 B. & P. N. R. 80; *Marsh v. Hutchinson*, 2 Boss. & P. 226; *Williamson v. Dawes*, 9 Bing. 292.

tract debts for which she can be sued in England. In *Kay v. Duchesse de Pienne*, where Lord Ellenborough's ruling at Nisi Prius was confirmed by the Court in Banco (3 Camp. 123), his Lordship confined the doctrine of Lord Kenyon to cases where the husband *has never been in the kingdom*, not simply residing abroad, separate from his wife. And in *Boggett v. Frier* (11 East, 303), the Court observed to counsel, that all these old cases were, so far as opposed to *Marshall v. Rutton* (8 T. R. 545), overruled by that case. In *Barden v. Keverberg*,³ where the defendant pleaded coverture, plaintiff replied that defendant's husband was an alien residing abroad, and had never been within the United Kingdom; and that the debt was contracted by the defendant in England, where she was living separate and apart from her husband, as a *feme sole*, and that the plaintiff gave credit to her as a *feme sole*; and that she made the promise in the declaration mentioned as a *feme sole*. There was no

³ 2 M. & W. 61.

Abandonment in a foreign country.—Where a husband deserted his wife in a foreign country and she afterwards maintaining herself in this country as a single woman, she is competent to contract, sue and be sued as a *feme sole*. *Gregory v. Pierce*, 45 Mass. (4 Metc.) 478; *Gregory v. Paul*, 15 Mass. 31. For this purpose an abandonment in another state of the United States is equivalent to an abandonment in a foreign state, because the husband is equally beyond operation of the laws of the state and the jurisdiction of its courts. *Gregory v. Pierce*, 45 Mass. (4 Metc.) 478; *Abbot v. Bayley*, 23 Mass. (6 Pick.) 89. In the former case the courts say: "The principle is now to be considered as established in Massachusetts, as a necessary exception to the rule of the common law placing a married woman under disability to contract or maintain a suit, that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights

and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name, as a *feme sole*. It is an application of an old rule of the common law, which took away the disability of coverture when the husband was exiled or had abjured the realm. In *Abbot v. Bayley*, 23 Mass. (6 Pick.) 89, it was held that, in this respect, the residence of the husband in another state of the United States was equivalent to a residence in a foreign state, he being equally beyond the operation of the laws of the commonwealth and the jurisdiction of the courts." See, also, *James v. Stewart*, 9 Ala. 855; *Commonwealth v. Cullins*, 1 Mass. 116; *Chouteau v. Merry*, 3 Mo. 254; *Edwards v. Davies*, 16 Johns. (N. Y.) 281; *Troughton v. Hill*, 2 Hayw. (N. C.) 406; *Valentine v. Ford*, 2 Browne (Pa.) 193; *Wright v. Wright*, 2 De-saus. (S. C.) Eq. 242; *Bean v. Morgan*, 4 McC. (S. C.) 148; *Boyce v. Owens*, 1 Hill (S. C.) 8; *Robinson v. Reynolds*, 1 Aik. (Vt.) 174; *Story on Partn.* § 10.

demurrer, but the case was tried on the facts alleged by the replication, and denied by rejoinder, and the verdict for plaintiff was set aside by the Court in Banco. Parke B. said: — “Supposing the replication good, *although I have a strong opinion that it is not* (because the cases in which the wife has been held liable, her husband being abroad, apply only where he is *civiliter mortuus*), you are bound under it, to make out that the husband was an alien, that he was resident abroad, and never in this country, which facts are now admitted — and *also* that the defendant represented herself as a *feme sole*, or that the plaintiff dealt with her believing her to be a *feme sole* ;” and the same learned judge threw doubt upon the report of what Lord Ellenborough said in *Kay v. Duchesse de Pienne*.

§ 41. More recently the case of *De Wahl v. Braune*¹ came before the Exchequer. The declaration was on an agreement to purchase the interest of the plaintiff in the benefit of a lease and school for young ladies. Plea in abatement, plaintiff's coverture. Replication, that her husband was an alien, born * in Russia, did not reside in this country [*35] at the commencement of the action, was never a subject of this country; that the cause of action accrued to plaintiff in England, while she was a subject of our lady the Queen, residing here separate and apart from her husband; that defendant became liable to her as a single woman, and that before and at the time of the commencement of the suit war existed between Russia and this country, and that her husband resided in Russia, and adhered to the said enemies of our lady the Queen. On demurrer, held that the wife could not sue as a *feme sole*; that her husband was not *civiliter mortuus*, and that the contract made during coverture was the husband's. In this case the action was by the wife, but the reasoning of the Court would have been equally applicable if her condition had been reversed, and she had been the defendant instead of the plaintiff.

§ 42. The only remaining exception to the absolute incapacity of a married woman to bind herself as purchaser

¹ 1 H. & N. 178, and 25 L. J. Ex. 343.

during coverture, is one which arises under the custom of London, and is confined to the City of London. By that custom, a *feme covert* may be a *sole trader*, and when so, she may sue and be sued in the City Courts in all matters arising out of her dealings in her trade in London. In the well-known case of *Beard v. Webb*,¹ where Lord Eldon C. J. delivered the judgment of the Exchequer Chamber, revising that of the King's Bench, this custom is elaborately considered, in connection with the general law on the subject of the wife's capacity to contract as a *feme sole* during marriage; and the custom is described in the pleadings as a custom "that where a *feme covert* of a husband useth any craft in the said city on her sole account, whereof her husband meddleth nothing, such a woman shall be charged as *feme sole* concerning everything that touched her craft."²

§ 43. In equity where a married woman had separate estate, without restraint on anticipation, she was, to a certain

¹ 2 B. & P. 93; see also Macqueen, *Husband and Wife*, 361, ed. 1872, where this custom is set out at length.

² See *Langham v. Bewett*, Cro. Cas. 67; *Beard v. Webb*, 2 Boss. & Pull. 93, 101. In Pennsylvania, see *Cleaver v. Scheetz*, 70 Pa. St. 496; *Burke v. Winkle*, 2 Serg. & R. (Pa.) 189; *Jacobs v. Featherstone*, 6 Watts & S. (Pa.) 346; and South Carolina, *Newbiggin v. Pillans*, 2 Bay (S. C.) L. 162; *McDaniel v. Cornwell*, 1 Hill (S. C.) L. 428; *Starr v. Taylor*, 4 McC. (S. C.) L. 413; *Blythwood v. Everingham*, 3 Rich. (S. C.) L. 285; *Hobart v. Lemon*, 3 Rich. (S. C.) L. 131; *Dial v. Neuffer*, 3 Rich. (S. C.) 78.

Married women as feme sole traders: South Carolina doctrine.—A married woman may act as a *feme sole* trader, and become liable as such where she is technically a trader. *Newbiggin v. Pillans*, 2 Bay (S. C.) L. 162; *Surtell v. Brailsford*, 2 Bay (S. C.) 333; *Robards v. Price*, 3 McC. (S. C.) L. 475; *McDowall v. Wood*, 2 N. & McC. (S. C.) 242. See *McDaniel v. Cornwell*, 1 Hill (S. C.)

L. 428; *Ervart v. Nagel*, 1 McMull. (S. C.) L. 50. A wife may become a sole trader by permission of her husband and become entitled to her earnings and separate estate even without deeds. *McGrath v. Robertson*, 1 Desaus. (S. C.) Eq. 445. A married woman acting as a *feme sole* trader may enter into a bond which relates to or is in some manner connected with her business. *McDowall v. Wood*, 2 N. & McC. (S. C.) 242. A *feme covert* acting as sole trader, living apart from her husband and not under his power, is liable to an indictment for retailing spirituous liquors without a license (*State v. Collins*, 1 McC. (S. C.) L. 355); and she will be liable personally under an ordinance prohibiting retailers of liquors from selling to persons of certain classes, or admitting them into the premises, although the liquor was given to such persons by her husband acting as her agent and in her presence. *City Council v. Van Roven*, 2 N. & McC. (S. C.) L. 465.

extent, considered as a *feme sole* with respect to that property, and might so contract as to render it liable for the payment *of her debts. In respect of her [*36] purchases the rule was that if she, having separate property unfettered by any restraint on anticipation, entered into a pecuniary engagement, whether by ordering goods or otherwise, which, if she were a *feme sole*, would constitute her a debtor, and in entering into such engagement she purported to contract not for her husband but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she was contracting, that constituted an obligation for which the person with whom she contracted had the right to make her separate estate liable.¹

¹ *Mrs. Matthewman's Case*, 3 Eq. 781, 787. See, also, *Shattock v. Shattock*, 2 Eq. 182; *Johnson v. Gallagher*, 8 De G., F. & J. 404; *London Chartered Bank v. Lemprière*, L. R. 4 P. C. 572; *Picard v. Hine*, 5 Ch. 274; *Pike v. Fitzgibbon*, 17 Ch. D. 454, C. A.

American authorities.—*Craft v. Roland*, 37 Conn. 491; *Wells v. Thornman*, 37 Conn. 318; *Willard v. Eastham*, 81 Mass. (15 Gray) 328; *Johnson v. Cummins*, 16 N. J. Eq. (1 C. E. Gr.) 97; *Johnson v. Vail*, 14 N. J. Eq. (1 McCar.) 423; *Gosman v. Cruger*, 69 N. Y. 87; *Yale v. Dederer*, 68 N. Y. 329; s. c. 18 N. Y. 265; *Conlin v. Cantrell*, 34 N. Y. 217; *Bank of Watkins v. Miller*, 63 N. Y. 639; *Downing v. O'Brien*, 67 Barb. (N. Y.) 582; *Lennox v. Eldred*, 65 Barb. (N. Y.) 410; *Bogert v. Gulick*, 65 Barb. (N. Y.) 322; *Kelso v. Tabor*, 52 Barb. (N. Y.) 125; *Manchester v. Sahler*, 47 Barb. (N. Y.) 155; *Hutchinson v. Underwood*, 27 Tex. 255; *La Touche v. La Touche*, 3 H. & C. 576; *Johnson v. Gallagher*, 3 De G., F. & J. 494, and note 2; *Butler v. Cumpston*, L. R. 7 Eq. 20, 21.

Charging separate property of married women.—The English doctrine as laid down in the text has been

adopted in a majority of the American states. *Short v. Battle*, 52 Ala. 456; *Cowles v. Pollard*, 51 Ala. 445; *Brame v. McGee*, 46 Ala. 170, 174; *Nunn v. Givhan*, 45 Ala. 375; *Wilkinson v. Cheatham*, 45 Ala. 341; *Gunter v. Williams*, 40 Ala. 561; *Paulk v. Wolf*, 34 Ala. 541; *Baker v. Gregory*, 28 Ala. 544; s. c. 65 Am. Dec. 366; *Ozley v. Ikelheimer*, 26 Ala. 332; *Puryear v. Puryear*, 16 Ala. 486; *Palmer v. Rankins*, 30 Ark. 771; *Buckner v. Davis*, 29 Ark. 444, 447; *Oswalt v. Moore*, 19 Ark. 257; *Dobbin v. Hubbard*, 17 Ark. 189, 196; s. c. 65 Am. Dec. 425; *Maclay v. Love*, 25 Cal. 367; *Miller v. Newton*, 23 Cal. 554; *Platt v. Hawkins*, 43 Conn. 139, 143; *Buckingham v. Moss*, 40 Conn. 461; *Wells v. Thorman*, 37 Conn. 318; *Taylor v. Shelton*, 30 Conn. 122; *Imlay v. Huntington*, 20 Conn. 149; *Caulk v. Fox*, 13 Fla. 148; *Alston v. Rowles*, 13 Fla. 117; *Abernathy v. Abernathy*, 8 Fla. 243; *Sanderson v. Jones*, 6 Fla. 430; s. c. 63 Am. Dec. 217; *Maiben v. Robe*, 6 Fla. 381; *Lewis v. Yale*, 4 Fla. 418; *Smith v. Poythress*, 2 Fla. 92; s. c. 48 Am. Dec. 176; *Morrison v. Solomon*, 52 Ga. 206; *Seabrook v. Brady*, 47 Ga. 650; *Van Arsdale v. Joiner*, 44 Ga. 174; *Huff v. Wright*, 39 Ga. 41; *Dal-*

§ 44. Previous to the Married Women's Property Act, 1882, legislation had already made wide inroads upon the

las v. Heard, 32 Ga. 604; *Robert v. West*, 15 Ga. 123; *Fears v. Brooks*, 12 Ga. 195; *Wylly v. Collins*, 9 Ga. 223; *Weeks v. Sego*, 9 Ga. 199, 201; *Furness v. McGovern*, 78 Ill. 338; *Williams v. Hugunin*, 69 Ill. 214; s. c. 18 Am. Dec. 607; *Schmidt v. Postel*, 63 Ill. 58; *Carpenter v. Mitchell*, 50 Ill. 470; *Pomeroy v. Manhattan Life Ins. Co.*, 40 Ill. 398; *Shannon v. Bartholomew*, 53 Ind. 54; *Hodson v. Davis*, 43 Ind. 258; *Hasheagan v. Specker*, 36 Ind. 414; *Kantrowitz v. Prather*, 31 Ind. 105; *Abdil v. Abdil*, 26 Ind. 287; *Cox's Adm'r v. Wood*, 20 Ind. 54; *Reese v. Cochran*, 10 Ind. 195; *Patton v. Kinsman*, 17 Iowa, 428; *Knaggs v. Mastin*, 9 Kan. 532; *Wicks v. Mitchell*, 9 Kan. 88; *Deering v. Boyle*, 8 Kan. 525; s. c. 12 Am. Rep. 480; *Long v. White*, 5 J. J. Marsh. (Ky.) 226; *Burch v. Breckenridge*, 16 B. Mon. (Ky.) 482; *Coleman v. Wooley*, 10 B. Mon. (Ky.) 320; *Lillard v. Turner*, 16 B. Mon. (Ky.) 374; *Sweeney v. Smith*, 15 B. Mon. (Ky.) 325; *Bell v. Keller*, 13 B. Mon. (Ky.) 381; *Jarman v. Wilkerson*, 7 B. Mon. (Ky.) 293; *Barbet v. Roth*, 16 La. An. 271; *Hall v. Eccleston*, 37 Md. 510; *Cooke v. Husbands*, 11 Md. 492; *Miller v. Williamson*, 5 Md. 219; *Allen v. Fuller*, 118 Mass. 402; *Tracy v. Keith*, 92 Mass. (11 Allen) 214; *Rogers v. Ward*, 90 Mass. (8 Allen) 387; *Willard v. Eastham*, 81 Mass. (15 Gray) 328; s. c. 77 Am. Dec. 366; *Powers v. Russell*, 26 Mich. 179; *Ran-kin v. West*, 25 Mich. 195; *Denison v. Gibson*, 24 Mich. 187; *De Vries v. Conklin*, 22 Mich. 255; *Pond v. Car-penter*, 12 Minn. 432; *Whiteley v. Stewart*, 63 Mo. 363; *Gage v. Gates*, 62 Mo. 412, 417; *Bank v. Taylor*, 62 Mo. 338; *Lincoln v. Rowe*, 51 Mo. 571; *Miller v. Brown*, 47 Mo. 504; s. c. 4 Am. Dec. 345; *Kimm v. Weip-pert*, 46 Mo. 532; s. c. 2 Am. Rep. 541; *Schafroth v. Ambs*, 46 Mo. 114; *Claffin v. Van Wagoner*, 32 Mo. 252; *Segond v. Garland*, 23 Mo. 547; *White-sides v. Cannon*, 23 Mo. 457; *Coats v. Robinson*, 10 Mo. 757; *Vogt v. Tick-nor*, 48 N. H. 242; *Batchelder v. Sar-gent*, 47 N. H. 262; *Nims v. Bigelow*, 45 N. H. 343; *Hutchins v. Colby*, 43 N. H. 159; *Perkins v. Elliott*, 23 N. J. Eq. (8 C. E. Gr.) 526; *Armstrong v. Ross*, 20 N. J. Eq. (5 C. E. Gr.) 109; *Johnson v. Cummins*, 16 N. J. Eq. (5 C. E. Gr.) 97, 104; *Oakley v. Pound*, 14 N. J. Eq. (McCar.) 178; *Leay-croft v. Hedden*, 4 N. J. Eq. (3 H. W. Gr.) 512; *Pentz v. Simonson*, 3 N. J. Eq. (2 Beas.) 232; *Williams v. Urm-ston*, 35 Ohio St. 296; s. c. 35 Am. Rep. 611; *Phillips v. Graves*, 20 Ohio Stat. 390; s. c. 5 Am. Rep. 675; *Hardy v. Van Harlingen*, 7 Ohio St. 208; *Milburn v. Walker*, 11 Tex. 329; *Pat-ridge v. Stocker*, 36 Vt. 117; *Darnall v. Smith*, 26 Gratt. (Va.) 878; *Bur-net v. Hawpes*, 25 Gratt. (Va.) 486; *Muller v. Bayley*, 21 Gratt. (Va.) 528; *Penn v. Whitehead*, 17 Gratt. (Va.) 503; *Nixon v. Rose*, 12 Gratt. (Va.) 431; *Woodson v. Perkins*, 5 Gratt. (Va.) 345; *Lee v. Bank of the U. S.*, 9 Leigh (Va.) 200; *Williamson v. Beckham*, 8 Leigh (Va.) 20; *Vizon-neau v. Pegram*, 2 Leigh (Va.) 183; *West v. West*, 3 Rand. (Va.) 373; *Ellis v. Baker*, 1 Rand. (Va.) 47; *Rad-ford v. Carwile*, 13 W. Va. 572; *Todd v. Lee*, 16 Wis. 484; *Todd v. Lee*, 15 Wis. 380. In Mississippi, North Car-olina, Pennsylvania, Rhode Island, South Carolina and Tennessee (*Davis v. Wilkerson*, 48 Miss. 585; *Wichter v. Wilson*, 47 Miss. 663; *Pollen v. James*, 45 Miss. 129; *Witworth v. Carter*, 43 Miss. 61; *Armstrong v. Stovall*, 26 Miss. 275; *Robertson v. Bruner*, 24 Miss. 242; *Doty v. Mitch-ell*, 17 Miss. (9 Smed. & M.) 435; *Atkinson v. Richardson*, 74 N. C. 458; *Pippen v. Wesson*, 74 N. C. 442; *New-lin v. Freeman*, 4 Ired. (N. C.) Eq.

common law rules to which reference has been made. By 20 & 21 Vict. c. 85, s. 21, a wife deserted by her husband may obtain an order to protect her earnings and property, the effect of which order during its continuance is to place her "in the like position in all respects with regard to property and contracts as she would be under this Act if she obtained a decree of judicial separation." And the effect of such a decree is stated by the 26th section to be that "the wife shall while so separated be considered as a *feme sole* for the purposes of contract, and wrongs and injuries, and *suing and being sued* in any civil proceeding."¹ Further provision is made by the 21 & 22 Vict. c. 108, ss. 8, 9, 10, for the protection of persons dealing with wives who have obtained the order above described.

The 33 & 34 Vict. c. 93 (amended by 37 & 38 Vict. c. 50), conferred upon married women a separate estate in certain specified property, including their wages or earnings and the investments thereof, deposits made by them in savings banks, property in the funds, and property devolving upon them on an intestacy, and also conferred upon them the *same capacity to contract with reference to this [*37] "statutory" separate estate which they possessed in equity, with reference to their equitable separate estate; but

312; *Frazier v. Brownlow*, 3 Ired. (N. C.) Eq. 237; s. c. 43 Am. Dec. 165; *Harris v. Harris*, 7 Ired. (N. C.) Eq. 111; s. c. 53 Am. Dec. 393; *Knox v. Jordan*, 5 Jones (N. C.) Eq. 175; *Rogers v. Hinton*, Phil. (N. C.) Eq. 101; *Metcalf v. Cook*, 2 R. I. 355; *Kirby v. Miller*, 4 Coldw. (Tenn.) 4; *Marshall v. Stephens*, 8 Humph. (Tenn.) 159; *Ware v. Sharp*, 1 Swan. (Tenn.) 489; *Morgan v. Elam*, 4 Yerg. (Tenn.) 375), it is held that a married woman is *feme sole* as to her separate estate only in so far as the instrument granting it has expressly conferred upon her the power to act as such. See *Davis v. Wilkerson*, 48 Miss. 585; *Wichter v. Wilson*, 47 Miss. 603; *Pollen v. James*, 45 Miss. 129; *Whitworth v. Carter*, 43 Miss.

61; *Armstrong v. Stoval*, 26 Miss. 275; *Robertson v. Bruner*, 24 Miss. 242; *Doty v. Mitchell*, 17 Miss. (9 Smed. & M.) 435; *Atkinson v. Richardson*, 74 N. C. 458; *Pippen v. Wesson*, 74 N. C. 442; *Newlin v. Freeman*, 4 Ired. (N. C.) Eq. 312; *Frazier v. Brownlow*, 3 Ired. (N. C.) Eq. 237; s. c. 43 Am. Dec. 165; *Harris v. Harris*, 7 Ired. (N. C.) Eq. 111; s. c. 53 Am. Dec. 393; *Knox v. Jordan*, 5 Jones (N. C.) Eq. 175; *Rogers v. Hinton*, Phil. (N. C.) Eq. 101; *Metcalf v. Cook*, 2 R. I. 355; *Kirby v. Miller*, 4 Coldw. (Tenn.) 4; *Marshall v. Stephens*, 8 Humph. (Tenn.) 209; *Ware v. Sharp*, 1 Swan. (Tenn.) 489; *Morgan v. Elam*, 4 Yerg. (Tenn.) 375.

¹ See *Ramsden v. Brearly*, L. R. 10 Q. B. 147.

a creditor could not enforce a claim against the separate estate without joining the husband as a defendant in the action.²

And now the 45 & 46 Vict. c. 75 (The Married Women's Property Act, 1882), repealing the earlier Acts of 1870 and 1874, except as to any rights acquired or liabilities accruing under them, has entirely altered the position of a married woman at common law, and in some important respects her position in equity. It enables a married woman to acquire, hold and dispose of every species of property as though she were a *feme sole*, to contract, and to sue and be sued apart from her husband, and confers upon her for these purposes an independent status. It thus destroys, so far as relates to property, the old common law doctrine of conjugal unity.³

The effect of the Act, as contained in the first five sections, is that when a married woman is a purchaser the seller may now bring an action either in the Queen's Bench⁴ or the

² *Married women's statutes.* — In the absence of the statute giving her power, a married woman, in purchasing goods appropriate to her family needs where she is living with her husband, cannot bind her separate estate. *Powers v. Russell*, 26 Mich. 179, 184; *Campbell v. White*, 22 Mich. 178. See *Labaree v. Colby*, 99 Mass. 559; *Stewart v. Jenkins*, 88 Mass. (6 Allen) 300; *Tillman v. Shackleton*, 15 Mich. 447; *Draper v. Stouvenel*, 35 N. Y. 507; *Knapp v. Smith*, 27 N. Y. 277; *Darby v. Callaghan*, 16 N. Y. 71.

But in most of the states of the Union the principles and rules of the common law applicable to the wife have been changed by legislation in a manner similar to the changes mentioned in the text, but far more extensive and important. See *Stims Am. Stat.* Thus, for instance, under the provisions of the Massachusetts statutes, a wife may be sued as though she were a *feme sole*. See *Massachusetts Gen. Stat. of 1869*, ch. 304; *Statutes of 1874*, ch. 184. See, also, *Labaree v. Colby*, 99 Mass. 559; *Tracy v.*

Keith, 93 Mass. (11 Allen) 214; *Spaulding v. Day*, 92 Mass. (10 Allen) 96; *Granger v. Ilsley*, 68 Mass. (2 Gray) 521.

³ See *In re Marsh, Mander v. Harris*, 24 Ch. D. 222.

⁴ The Queen's Bench Division now possesses the requisite machinery for taking accounts with all necessary inquiries and directions usual in the Chancery Division. For the form of judgment in such an action, see *McQueen v. Turner*, 30 W. R. 81.

It was decided in *Stewart v. Jenkins*, 88 Mass. (6 Allen) 300, that a contract by which a married woman acquired separate property was a contract in reference to her separate property within the meaning of the statute, and a promissory note given by her in payment for a homestead conveyed to her sole and separate use, would be enforced against her. *Labaree v. Colby*, 99 Mass. 559. And in *Spaulding v. Day*, 92 Mass. (10 Allen) 96, it was held that a note given by a married woman for wool sold to her own credit and delivered at a house owned by her was binding.

Chancery Division of the High Court against her alone, for the purpose of enforcing his claim against her separate property; but it will still be necessary to join the husband as defendant in those cases where alternative relief can be obtained against him. What will be included in the wife's separate property will depend to some extent upon the date of the marriage. It will comprise all property settled to her separate use without restraint on anticipation, and, if the marriage took place after the commencement of the Act, all real and personal property belonging to her at the time of the marriage, or acquired by or devolving upon her after marriage; if the marriage took place before the commencement of the Act, all real and personal property to which her title accrued after the * commencement of [*38] the Act. The presumption will be that the married woman's contract of purchase was made with reference to her separate property, and it will bind not only separate property of which she was possessed or to which she was entitled at the time of the contract, but also all after-acquired separate property.⁵ The better opinion would seem to be that the married woman under these provisions is not rendered personally liable, but that, as in equity before the Act, an obligation is incurred which may be discharged not by reaching her, but by reaching her separate property.

A married woman is rendered subject to the bankruptcy laws in the particular case where she carries on a trade separately from her husband, but not otherwise, and this provision is confirmed by the new Bankruptcy Act, 1883.⁶

As to what constitutes a married woman's separate trade or business, the reader is referred to the cases of *Ashworth v. Outram*⁷ and *Lovell v. Newton*.⁸

It is important to observe that the Act does not affect settlements, nor render inoperative any restraint upon anticipation, present or future.⁹

⁵ Thus overruling *Pike v. Fitzgibbon*, 17 Ch. D. 454, C. A.

⁶ Sect. 152. This was the law previous to and under the Act of 1870. See *Ex parte Jones*, 12 Ch. D. 485, C. A., solving the doubt ex-

pressed by Mellish L. J. in *Ex parte Culley*, 9 Ch. 307, 311.

⁷ 5 Ch. D. 923, C. A.

⁸ 4 C. P. D. 7.

⁹ Sect. 19. See *In re Stonor's Trusts*, 24 Ch. D. 195. The court

It may be a question how far the presumption which is now raised that the married woman contracted with respect to her separate property will be rebutted by proof that she has contracted under circumstances in which before the Act she would have had implied authority to pledge her husband's credit. Probably it would be held that the Act has not affected the wife's position as her husband's agent, and the husband's liability in such cases, but the point is one more properly to be considered under the law of agency.]

[*38a] § 45. *The 45 & 46 Vict. c. 75 (The Married Women's Property Act, 1882), which came into operation on the first of January of the present year¹ received the royal assent some time after the sheets of the earlier part of this edition had been sent to the press. The new Act, which repeals the earlier Acts of 1870 and 1874, except as to any rights or liabilities accruing under them, entirely alters the position of married women at common law, and in a great measure their position in equity. It enables them to acquire, hold, and dispose of every species of property, to contract, and to sue and be sued apart from their husbands, and confers upon them for these purposes an independent status. The following sections of the Act are those which seem more or less to bear upon the special subject of this treatise.

The 1st section provides that (1) "A married woman shall, in accordance with the provisions of the Act, be capable of *acquiring*, holding, and *disposing* by will or otherwise, of any real or *personal property* as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee. (2) A married woman shall be capable of *entering into and rendering herself liable* in respect of and to the extent of her separate property *on any contract*, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defend-

may dispense with the restraint under R. 488; *Tamplin v. Miller*, W. N. 44 & 45 Vict. c. 41, s. 39 (Conv. Act, (1882), 44. 1882). *Hodges v. Hodges*, 30 W. ¹1883.

ant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise. (3) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown. (4) Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire. (5) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*."

And the 2d section enacts that "Every woman who *marries *after* the commencement of the Act shall be [*386] entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and *personal property* which shall belong to her at the time of marriage, or shall be *acquired by or devolve upon her* after marriage, including any wages, earnings, money, and *property gained or acquired by her* in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

By the 5th section "Every woman married *before* the commencement of the Act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property, all real and *personal property*, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue *after* the commencement of the Act, including any wages, earnings, money, and *property* so gained or acquired by her as aforesaid."

By the 6th section *all investments* therein specified (which it is believed include every kind of investment), which at the

commencement of the Act were standing in the sole name of a married woman, are to be deemed, unless and until the contrary be shown, to be the separate property of such married woman: and the fact that any such investments as aforesaid are standing in the sole name of a married woman shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorize and empower her to receive or *transfer the same without the concurrence of her husband*, and to indemnify the individuals or public bodies, with whom the investments are made, in respect thereof.

By the 7th section any interest in any corporation, company, public body, or society, which after the commencement of the Act shall be allotted to, or placed or registered or transferred in, or into, or made to stand in the sole name of any married woman, is to be deemed, unless and until the contrary be shown, to be her separate property, in respect of which her separate estate shall alone be liable; but nothing in the Act is to require or authorize any corporation or joint-stock company to admit a married woman to be a holder of shares, to which any liability may be incident, if they are prohibited from doing so by their constitution or by-laws.

By the 8th section the foregoing provisions are to apply, as well to investments in the name of any married woman jointly with any persons or person *other than her husband*, as to investments in her sole name.

[*38c] * By the 9th section it shall not be necessary for *the husband* of any married woman, *in respect of her interest, to join in the transfer* of any investment as aforesaid, which is at the commencement of the Act, or shall be at any time thereafter standing in the sole name of any married woman, or in the joint names of such married woman and any person or persons not being her husband.

By the 12th section "Every woman, *whether married before or after the Act*, shall have in her own name against all persons whomsoever, *including her husband*, the same civil remedies . . . *for the protection and security of her own separate property*, as if such property belonged to her as a *feme sole*, . . . and in any proceeding under this section a husband

or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding."

By the 19th section all existing and future settlements are saved, and it is provided that the Act shall not interfere with, or render inoperative, any *restriction against anticipation*.

From a consideration of these sections of the Act it is manifest that, for the future where a married woman has property which is settled to her separate use, or created her separate property by the provisions of the Act, she will, unless restrained from anticipation, be, to the extent of that property, in the same position as if she were a *feme sole*. It is presumed that with regard to property acquired by her as a separate trader, she will be in the same position. The rights and liabilities acquired and incurred by married women under the Married Women's Property Acts, 1870 and 1874, are preserved by the new Act. The question raised in *Summers v. The City Bank*,² as to a married woman's general right to maintain an action in her own name for damages for breach of contract, is settled by sec. 1, sub-sect. 2, of the new Act, while the doctrine of *Ashworth v. Outram*,³ as to stock-in-trade, is rendered obsolete by sect. 2. A married woman, deserted by her husband, would seem no longer to require a protection order under 20 & 21 Vict. c. 85.⁴

As to a married woman's liability to bankruptcy, the Act will probably give rise to some doubt. A married woman carrying on a trade separately from her husband is expressly made liable to bankruptcy by sect. 1 sub-sect. 5, and the natural inference is that as the Act points out a particular *case in which married women are to be liable, [*38d] their liability is excluded in every other. It was held in *Ex parte Jones*,⁵ that before the Married Woman's Property Act, 1870, a married woman was not liable to bankruptcy, and that the Act had not altered her position in that

² L. R. 9 C. P. 580. *Vide ante*, p. 37, § 44.

⁴ *Vide ante*, p. 35, § 42.

³ 5 Ch. D. 923, C. A. *Vide ante*, p. 37, § 44.

⁵ 12 Ch. D. 484, C. A. *Vide ante*,

p. 38, § 44, note 7.

respect.⁶ But the ground of the decision of the Court of Appeal in that case was, that the Act of 1870 had not ren-

⁶ *Enabling statutes.*—In most, if not all, of the states, enabling statutes have been passed, similar to those given in the text, by which all the property that a woman has at the time of her marriage, or which comes to her by inheritance, or is acquired after marriage, remains her separate property and is under her separate management and control the same as though she were a *feme sole*. These statutes invade and abrogate the common law to the extent of the interest and rights, conferred by them, but they do not invade or interfere with the equity doctrine, because the principles of both are the same. See *Short v. Battle*, 52 Ala. 463; *Morrison v. Norman*, 47 Ill. 481; *Richardson v. Stodder*, 100 Mass. 530; *Mitchell v. Otey*, 23 Miss. 236; *Batchelder v. Sargent*, 47 N. H. 262; *Albin v. Lord*, 39 N. H. 196; *Peake v. LaBaw*, 21 N. J. Eq. (6 C. E. Gr.) 269; *Ballin v. Dillaye*, 37 N. Y. 35; *Colvin v. Currier*, 22 Barb. (N. Y.) 371. Consequently the common law prevails except in so far as the statutes expressly or by necessary implication change it. *Alverson v. Jones*, 10 Cal. 9; s. c. 70 Am. Dec. 689; *Farrell v. Patterson*, 43 Ill. 52; *Johnson v. Runyon*, 21 Ind. 115; *Smith v. Hewett*, 13 Iowa, 94; *Brookings v. White*, 49 Me. 479; *Edwards v. Stevens*, 85 Mass. (3 Allen) 315; *Lord v. Parker*, 85 Mass. (3 Allen) 129; *Mallett v. Parham*, 52 Miss. 922; *Cary v. Dixon*, 51 Miss. 599; *Staton v. New*, 49 Miss. 309; *Whitworth v. Carter*, 43 Miss. 72; *Smith v. Henry*, 35 Miss. 369; *Stewart v. Ball*, 33 Mo. 154; *Perkins v. Perkins*, 62 Barb. (N. Y.) 531; *Hurd v. Cass*, 9 Barb. (N. Y.) 366; *Berley v. Rampacher*, 5 Duer (N. Y.) 183; *Mahon v. Gormley*, 24 Pa. St. 82; *Diver v. Diver*, 56 Pa. St. 106; *Stanton v. Kirsch*, 6 Wis. 338. Some of these statutes give the express power

to married women to contract; and where it is not given they have the same capacity to contract with reference to their separate estates that they had in equity before the passage of the statutes. These statutes are held to operate on the right of property and not on the power to dispose of it. *Yale v. Dederer*, 18 N. Y. 265; *Owen v. Cawley*, 36 N. Y. 600; *Todd v. Lee*, 15 Wis. 365, 380; *Jones v. Crosthwaite*, 17 Iowa, 393; *Shonk v. Brown*, 61 Pa. St. 320; *Kantrowitz v. Prather*, 31 Ind. 92; *Tracy v. Keith*, 93 Mass. (11 Allen) 214; *Whitworth v. Carter*, 43 Miss. 61; *Dunbar v. Meyer*, 43 Miss. 679; *Pond v. Carpenter*, 12 Minn. 430; *Bauer v. Bauer*, 40 Mo. 61; *Eckert v. Reuter*, 33 N. J. L. (4 Vr.) 266; *Glyde v. Keister*, 1 Grant (Pa.) 465.

Purchase of separate estate by married women.—Whether or not a married woman having no separate estate can under the enabling statute purchase property on her personal credit and thus incur a debt and acquire a separate estate by the same act, is a question that is unsettled. See *Kantrowitz v. Prather*, 31 Ind. 92; *Jones v. Crosthwaite*, 17 Iowa, 393; *Dunning v. Pike*, 46 Me. 461; *Tracy v. Keith*, 93 Miss. (11 Allen) 214; *Pond v. Carpenter*, 12 Minn. 430; *Dunbar v. Meyer*, 43 Miss. 679; *Whitworth v. Carter*, 43 Miss. 61; *Bauer v. Bauer*, 40 Mo. 61; *Eckert v. Reuter*, 33 N. J. L. (4 Vr.) 266; *Owen v. Cawley*, 36 N. Y. 600; *Yale v. Dederer*, 18 N. Y. 265; s. c. 72 Am. Dec. 503; *Bucher v. Ream*, 68 Pa. St. 421; *Shonk v. Brown*, 61 Pa. St. 320; *Robinson v. Wallace*, 39 Pa. St. 129; *Glyde v. Keister*, 1 Grant (Pa.) 461; *Lanier v. Ross*, 1 Dev. & B. (N. C.) Eq. 39; *Todd v. Lee*, 15 Wis. 365, 380. However, it seems that where she has a separate estate which is the foundation of the credit, she may buy on

dered the married woman liable to be personally sued as a debtor. Now, under sec. 1, sub-sect. 2, of the Act 1882, a married woman is liable to be sued in all respects as if she

credit. *Sixbee v. Bowen*, 91 Pa. St. 149; *Silveus v. Porter*, 74 Pa. St. 448; *Seeds v. Kahler*, 76 Pa. St. 262. See, also, *Dunbar v. Meyer*, 43 Miss. 679; *Carpenter v. Mitchell*, 50 Ill. 470.

It has been held in Alabama (*Wilkinson v. Cheatham*, 45 Ala. 337, 342), Arkansas (*Wood v. Terry*, 30 Ark. 385, 391; *Stidham v. Matthews*, 39 Ark. 650, 658), Illinois (*Carpenter v. Mitchell*, 50 Ill. 472), Indiana (*Light v. Lane*, 41 Ind. 539, 542; *Kyger v. Hull Skirt Co.*, 34 Ind. 249; *Haugh v. Blythe's Ex'rs*, 20 Ind. 24; *Johnson v. Chissom*, 14 Ind. 415, 416), formerly in Iowa (*Jones v. Crosthwaite*, 17 Iowa, 393, 402); but a contrary doctrine prevails in that state now (*Chamberlin v. Robertson*, 31 Iowa, 408), Maine (*Dunning v. Pike*, 46 Me. 461, 463), Mississippi (*Doyle v. Orr*, 51 Miss. 232; *Porterfield v. Butler*, 47 Miss. 165; *Whitworth v. Carter*, 43 Miss. 72; *Ratcliffe v. Collins*, 35 Miss. 581), Missouri (*Johnson v. Houston*, 47 Mo. 227), New Hampshire (*Ames v. Foster*, 42 N. H. 381), North Carolina (*Atkinson v. Richardson*, 74 N. C. 458), Pennsylvania (*Bucher v. Ream*, 68 Pa. St. 421; *Hollowell v. Horter*, 35 Pa. St. (11 Casey) 375) that a married woman cannot purchase real estate on credit; that she cannot use her disability in this as a means to defraud (*Foxworth v. Bullock*, 44 Miss. 464); and that if she paid anything on the purchase, she can have it rescinded, and recover back the money. *Cowles v. Marks*, 47 Ala. 622.

However, the true doctrine appears to be that a married woman can purchase on credit, and the thing purchased will be her separate estate (*Frieber v. Stover*, 30 Ark. 729; *Donovan's Appeal*, 41 Conn. 555; *Elder v. Cordray*, 54 Ill. 244; *Mitchell v.*

Smith, 32 Iowa, 483; *Chamberlin v. Robertson*, 31 Iowa, 408; *Shields v. Keys*, 24 Iowa, 313; *Allen v. Fuller*, 118 Mass. 402; *Larabee v. Colby*, 99 Mass. 559; *Spaulding v. Day*, 92 Mass. (10 Allen) 98; *Stewart v. Jenkins*, 88 Mass. (6 Allen) 300; *Fisk v. Wright*, 47 Mo. 352; *Pemberton v. Johnson*, 46 Mo. 342; *Huyler v. Atwood*, 26 N. J. Eq. (11 C. E. Gr.) 506; *Frecking v. Rolland*, 58 N. Y. 425; *Knapp v. Smith*, 27 N. Y. 279; *Brown v. Hermann*, 14 Abb. (N. Y.) Pr. 394; *Abbey v. Deyo*, 44 Barb. (N. Y.) 379; *Williamson v. Dodge*, 5 Hun (N. Y.) 498; *Bugbee v. Blood*, 48 Vt. 500; *Pringle v. Dunn*, 37 Wis. 468,) free from her husband's control and his antecedent debts, where neither his money nor anything of value belonging to him was used in the purchase thereof. *Spaulding v. Day*, 92 Mass. (10 Allen) 96; *Ham v. Boody*, 20 N. H. 411; *Coffin v. Morrill*, 2 Fost. (N. H.) 352; *Conrad v. Shomo*, 8 Wright, (Pa.) 193; *Buck v. Gilson*, 37 Vt. 653. In New York the doctrine that a married woman may purchase a separate estate on credit is upheld. See *Ackley v. Westervelt*, 86 N. Y. 448, 452. The court say in the course of the opinion that, "it is no longer open to dispute in this state that a married woman, although she carries on no business on her own account, and has no separate estate, is liable, like a *feme sole*, for debts contracted in the purchase and leasing of real estate, or other property. See, also, *Westervelt v. Ackley*, 21 N. Y. 617; s. c. 62 N. Y. 505. In New Jersey the same doctrine prevails as in New York, except that a married woman cannot bind herself to pay the debt of another. See *Vankirk v. Skillman*, 34 N. J. L. (5 Vr.) 109; *Perkins v. Elliott*, 23 N. J. Eq. (8 C. E. Gr.) 526.

were a *feme sole*, but it is not clear from the context whether the liability is intended to be a personal one or to be limited to the amount of her separate estate, in which latter case it is submitted, she would not be personally liable. It is obvious that the exemption from bankruptcy is of no benefit to the married woman, for all her property can be taken in execution by her creditors, and it is certainly a hardship on them to be under the necessity of adopting so circuitous a method of reaching the property of a person who is now for all practical purposes *sui juris*.

The great change which the Act has introduced in the equitable doctrine of a married woman's capacity to contract is contained in sect. 1, sub-sect. 4, *supra*. It was held by the Court of Appeal in *Pike v. Fitzgibbon*⁷ that a married woman could not bind by her contract any but the separate property of which she was possessed at the time of making the contract. But by the above sub-section of the Act every contract entered into by a married woman with respect to and to bind her separate property, will bind all her separate property, both that of which she is possessed at the time of the contract and any which she may have afterwards acquired.

It is also to be noticed, with regard to a married woman contracting as agent, whether for her husband or another, that by sect. 1, sub-sect. 3, *supra*, her contract will be deemed to have been entered into with respect to and to bind her separate property unless the contrary be shown. It is not clear that this enactment will affect the husband's liability in cases where his wife would have been presumed to be his agent before the Act, although it makes the wife liable unless she can prove that she did not contract on the faith of her separate estate.⁸

⁷ 17 Ch. D. 454, C. A. *Vide ante*, p. 38, § 44, note 7.

⁸ On these and other questions suggested by the Act, the reader is

referred to Mr. Thicknesse's book on The Married Women's Property Acts, who has kindly assisted the editors in the preparation of this note.

CHAPTER III.

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MUTUAL ASSENT.

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Section I. — OF MUTUAL ASSENT.

§ 46. THE assent of the parties to a sale need not be express.¹ It may be implied from their language,² or from

¹ See *Street v. Chapman*, 29 Ind. 17 C. B. N. S. 84, 101; *Payne v. Cave*, 3 T. R. 148; s. c. 1 Langdell's *Cas. on Contr.* 1.
² *See* *Street v. Chapman*, 29 Ind. 142, 152; *Gowing v. Knowles*, 118 Mass. 232, 233; *Hoadly v. McLaine*, 10 Bing. 482, 487; *Joyce v. Swann*, *Mutual assent.* — A contract of sale

is complete and binding upon the parties when their minds have met and they have mutually agreed to the terms and conditions. This mutual assent may be either implied or expressed; but it must be reciprocal and concurrent in time. See *Grodenkemper v. Achtermeyer*, 11 Bush (Ky.) 222; *Phillips v. Moor*, 71 Me. 78; *O'Neill v. James*, 43 N. Y. 84, 90; *Clark v. Dales*, 20 Barb. (N. Y.) 42, 60; *Vassar v. Camp*, 14 Barb. (N. Y.) 341; *Brisban v. Boyd*, 4 Paige (N. Y.) Ch. 17; *Mactier v. Frith*, 6 Wend. (N. Y.) 103; s. c. 21 Am. Dec. 262; *Slaymaker v. Irwin*, 4 Whart. (Pa.) 369; *Fitzhugh v. Jones*, 6 Munf. (Va.) 83; *Matteson v. Scofield*, 27 Wis. 671; *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Cooke v. Oxley*, 3 T. R. 653; *Payne v. Cave*, 3 T. R. 148; s. c. Langd. Cas. on Contr. 1. But a mere offer to sell or preliminary negotiations (*Lyman v. Robinson*, 96 Mass. (14 Allen) 254), do not constitute a contract of sale. *Smith v. Gowdy*, 90 Mass. (8 Allen) 566; *Beaupre v. Pacific & Atlantic Tel. Co.*, 21 Minn. 155; *Slaymaker v. Irwin*, 4 Whart. (Pa.) 369, 380; *Moulton v. Kershaw*, 59 Wis. 316; s. c. 48 Am. Dec. 516; *Kinghorne v. Montreal Tel. Co.*, 18 Up. Can. Q. B. 60.

The proposal must in some way be accepted before the contract of sale is complete, and at any time before such acceptance the proposal may be withdrawn. *Larmon v. Jordan*, 56 Ill. 204; *School Directors v. Trefethren*, 10 Ill. App. 127; *Grodenkemper v. Achtermeyer*, 11 Bush (Ky.) 222; *Downing v. Brown, Hardin* (Ky.) 181; *Boston & M. R. R. v. Bartlett*, 57 Mass. (3 Cush.) 224; *Fisher v. Sheltzer*, 23 Pa. St. 308; s. c. 62 Am. Dec. 355; *Faulkner v. Hebard*, 26 Vt. 452; *Payne v. Cave*, 3 T. R. 148; s. c. Lang. Cas. on Contr. 1. Thus a bidder at a sheriff sale (*Downing v. Brown, Hardin* (Ky.) 181; *Fisher v. Sheltzer*, 23 Pa. St. 308; s. c. 62 Am. Dec. 355), or at an auction sale (*Grodenkemper v. Ach-*

termeyer, 11 Bush (Ky.) 222; *Payne v. Cave*, 3 T. R. 148; s. c. Langd. Cas. on Contr. 1), may retract his bid at any time before the hammer falls. Where an offer has been accepted, although not within the time limited in the original proposition, if acted on it will be binding upon the party. *Boston & M. R. R. v. Bartlett*, 57 Mass. (3 Cush.) 224. See *Bean v. Burbank*, 16 Me. 458; s. c. 33 Am. Dec. 681. The language used must be positive and definite to amount to an acceptance. *Falls v. Gaither*, 9 Port. (Ala.) 605; *Craig v. Harper*, 51 Mass. (3 Cush.) 158; *McDonald v. Bewick*, 51 Mich. 79; *Tucker v. Woods*, 12 Johns. (N. Y.) 190; *Johnston v. Fessler*, 7 Watts (Pa.) 48; s. c. 32 Am. Dec. 738; *Fenno v. Weston*, 31 Vt. 345; *Johnson v. Filkington*, 39 Wis. 62.

Assent by performance signifies an acceptance of the proposition, for there is nothing more significant of the acceptance of a proposition than a compliance with it, especially where no notice of acceptance is required. *Patton v. Hassinger*, 69 Pa. St. 311. See *Lungstrass v. German Ins. Co.*, 48 Mo. 201; s. c. 8 Am. Rep. 100; *Crook v. Cowen*, 64 N. C. 743; *Cooper v. Altimus*, 62 Pa. St. 486, 490; *Fenton v. Braden*, 2 Cr. C. C. 550; *Adams v. Lindsell*, 1 Barn. & Ald. 681. But the performance must be in strict accordance with the terms of the offer. *Northam v. Gordon*, 46 Cal. 582; *Miller v. McMannis*, 57 Ill. 126; *Smith v. Wetherell*, 4 Ill. App. 655; *Morrill v. Tehama C. M. & M. Co.*, 10 Nev. 125; *Ueberroth v. Riegel*, 71 Pa. St. 280. As to what acts are sufficient to constitute a contract, see *Atwater v. Hough*, 29 Conn. 508; s. c. 79 Am. Dec. 229; *Loomis v. Smith*, 17 Conn. 115; *Forbes v. Marsh*, 15 Conn. 384; *Yulee v. Canova*, 11 Fla. 9; *Mason v. Thompson*, 35 Mass. (18 Pick.) 305; *Lungstrass v. German Ins. Co.*, 48 Mo. 201; s. c. 8 Am. Rep. 100; *Bass v. Walsh*, 39 Mo. 192; *Rodee v. Wade*, 47 Barb. (N. Y.) 53; *Naested v. Scott*, 4 Dev. & B. (N. C.) L. 389;

their conduct;³ may be signified by a nod or a gesture,⁴ or may even be inferred from silence in certain cases; as if a customer takes up wares of a tradesman's counter and carries them away, and nothing is said on either side, the law presumes *an agreement of sale for the reasonable worth of the goods.⁵ [*40]

§ 47. But the assent must, in order to constitute a valid contract, be *mutual*¹ and *intended to bind on both sides*.² It

Pennsylvania R. Co. v. Hughes, 39 Pa. St. 521; Bank of the United States v. Lyman, 20 Vt. 666; Beall v. Cockburn, 4 Call (Va.) 162; Pleasants v. Pendleton, 6 Rand. (Va.) 473; s. c. 18 Am. Dec. 726. Implied acceptance cannot be raised where an express agreement controls the terms of the contract. Wood v. Edwards, 19 Johns. (N. Y.) 212; Commercial Bank v. Pfeiffer, 29 N. Y. Sup. Ct. (22 Hun) 327; Walker v. Brown, 28 Ill. 378; Voorhees v. Combs, 33 N. J. L. (4 Vr.) 494.

Sham assent, or a merely colorable sale, will not pass title to property. Bradley v. Hale, 89 Mass. (8 Allen) 59; Cox v. Jackson, 88 Mass. (6 Allen) 108; Bruce v. Bishop, 43 Vt. 161.

² See a curious case of what one of the judges termed a "grumbling" assent, in Joyce v. Swann, 17 C. B. N. S. 84.

American authorities. — Pickrel v. Rose, 87 Ill. 263; Western Un. Tel. Co. v. Chicago & P. R. R. Co., 86 Ill. 246; s. c. 29 Am. Rep. 28; Tilt v. La Salle Silk M'fg Co., 5 Daly (N. Y.) 19; Brown v. Shaw, 1 Ont. App. 293; Barrett v. Rapelje, 4 Up. Can. Q. B. (O. S.) 175; Brogden v. Metropolitan Ry. Co., L. R. 2 App. Cas. 666.

³ Brogden v. Metropolitan Railway Company, 2 App. Cas. 666, where the parties had acted upon the terms of a draft, proposed agreement, which was intended to form the basis of a formal contract, to be afterwards executed by them both.

⁴ *What a sufficient assent.* — The fall of the auctioneer's hammer (Payne v. Cave, 3 T. R. 149; s. c. Langd. Cas. on Contr. 1), or a "grumbling assent" (Joyce v. Swan, 17 C. B. N. S. 84, 101), are sufficient; but loose conversation will not be. Thruston v. Thornton, 35 Mass. (1 Cush.) 89, 93; Bruce v. Bishop, 43 Vt. 161.

⁵ Bl. Com. book ii. ch. 30, p. 443; Hoadley v. McLaine, per Tindal C. J. 10 Bing. 482.

¹ *What amounts to a contract.* — Where the plaintiff gave the defendant a writing containing an order for certain articles, naming a port of delivery, and a price to be paid; it is not a contract of both parties. Brigg v. Hilton, 99 N. Y. 517; s. c. 1 Cent. Rep. 307, 311; Union Trust Co. v. Whiton, 79 N. Y. 172; Chapin v. Dobson, 78 N. Y. 74. But where there is an unrestricted offer, giving time for acceptance, when once accepted the contract is complete. Boston & M. R. R. Co. v. Bartlett, 57 Mass. (3 Cush.) 224; s. c. 1 Langdell Cas. Contr. 103. See, also, Stevenson v. McLean, L. R. 5 Q. B. Div. 346; s. c. 29 Moak. Eng. Rep. 341, 345; following Bryne v. Van Tienhoven, L. R. 5 C. P. Div. 344; s. c. 49 L. J. C. P. 316; 42 L. T. 371; 44 J. P. 667.

² *A proposal* must be accepted before it is a binding contract. Gowing v. Knowles, 118 Mass. 232; Smith v. Gowdy, 90 Mass. (8 Allen) 566; Thruston v. Thornton, 35 Mass. (1 Cush.) 89, 93; De Fonclear v. Shotenkirk, 3 Johns. (N. Y.) 170; 2 Kent

Com. 477. But if there is any error or mistake of a fact, or in circumstances going to the assent of the contract, there will be no contract. *Hammond v. Allen*, 2 Sumn. C. C. 395, 399; *Thornton v. Kempster*, 5 Taunt. 786.

The acceptance must correspond with the offer, neither falling short nor going beyond the terms proposed, but meeting and closing with them at all points. *Crocker v. New London, W. & P. R. R. Co.*, 24 Conn. 262, 263; *Salomon v. Webster*, 4 Col. 333; *Maclay v. Harvey*, 90 Ill. 525; s. c. 32 Am. Dec. 35; *McKinley v. Watkins*, 13 Ill. 140; *Fox v. Turner*, 1 Ill. App. 153; *Plant Seed Co. v. Hall*, 14 Kan. 553; *Jenness v. Mount Hope Iron Co.*, 53 Me. 20, 23; *Gowing v. Knowles*, 118 Mass. 232; *Smith v. Gowdy*, 90 Mass. (8 Allen) 566; *Allcott v. Boston Steam Flour Mill*, 63 Mass. (9 Cush.) 17; *Thruston v. Thornton*, 55 Mass. (1 Cush.) 89; *Wagner v. Eggleston*, 49 Mich. 218; *Eggleston v. Wagner*, 46 Mich. 610; *Abbott v. Shepard*, 48 N. H. 16; *Potts v. Whitehead*, 23 N. J. Eq. (8 C. E. Gr.) 512, 514; s. c. 20 N. J. Eq. (5 C. E. Gr.) 55; *McKibbin v. Brown*, 2 McCart. (N. J.) 498; s. c. 1 McCart. (N. J.) 13; *McGrath v. Brown*, 66 Barb. (N. Y.) 481; *Sourwine v. Truscott*, 17 Hun (N. Y.) 432; *Tucker v. Woods*, 12 Johns. (N. Y.) 190; s. c. 7 Am. Dec. 305; *Tuttle v. Love*, 7 Johns. (N. Y.) 470; *Bruce v. Pearson*, 3 Johns. (N. Y.) 526; *Bruce v. Bishop*, 43 Vt. 161, 163; *Utley v. Donaldson*, 94 U. S. (4 Otto) 29; bk. 24, L. ed. 54; *Carr v. Duval*, 39 U. S. (14 Pet.) 77; bk. 10, L. ed. 361; *Eliason v. Henshaw*, 17 U. S. (4 Wheat.) 225, 228; bk. 4, L. ed. 556; *Snow v. Miles*, 3 Cliff. C. C. 608; *Oriental Inland Steam Co. v. Briggs*, 4 De G., F. & J. (Am. ed.) 191; *Chinnock v. Marchioness of Ely*, 4 De G., J. & S. 638; *O'Fay v. Burke*, 8 Ir. Ch. Rep. 225, 511; *Heyward v. Barnes*, 23 L. T. 68; *Bickford v. Great Western Ry. Co.*, 28 Up. Can. C. P. 516; *Johnson v. Wil-*

son, 28 Up. Can. C. P. 432; *Murphy v. Thompson*, 58 Up. Can. C. P. 233; *McIntosh v. Brill*, 20 Up. Can. C. P. 426; *Thorne v. Barwick*, 16 Up. Can. C. P. 369; *Marshall v. Jamieson*, 42 Up. Can. Q. B. 115; *Carter v. Bingham*, 32 Up. Can. Q. B. 615; *Kinghorne v. Montreal Tel. Co.*, 18 Up. Can. Q. B. 60.

An acceptance varying the terms of the offer is a rejection thereof, and amounts to a new contract, and must be accepted by the vendor. See *Belfast & M. L. Ry. Co. v. Unity*, 62 Me. 148; *Gowing v. Knowles*, 118 Mass. 232; *Johnson v. Stephenson*, 26 Mich. 61; *Potts v. Whitehead*, 23 N. J. Eq. (8 C. E. Gr.) 512; *Demuth v. American Institute*, 75 N. Y. 502; *Corning v. Colt*, 5 Wend. (N. Y.) 253; *North Western Iron Co. v. Meade*, 21 Wis. 474; *National Bank v. Hall*, 101 U. S. (11 Otto) 43; bk. 25, L. ed. 822; *Utley v. Donaldson*, 94 U. S. (4 Otto) 29; bk. 24, L. ed. 54; *Carr v. Duval*, 39 U. S. (14 Pet.) 77; bk. 10, L. ed. 361; *Carter v. Bingham*, 32 Up. Can. C. P. 615; *McIntosh v. Brill*, 20 Up. Can. C. P. 426.

Force of acceptance. The acceptance of an offer is a sufficient consideration to bind the party making it. See *Bean v. Burbank*, 16 Me. 458; s. c. 33 Am. Dec. 681; *Boston & M. R. R. v. Bartlett*, 57 Mass. (3 Cush.) 224; *Abbott v. Shepard*, 48 N. H. 14; 2 Kent Com. 477. The bargain is closed and the contract binding when nothing remains to be done to give either party the right to have it enforced. *Abbott v. Shepard*, 48 N. H. 14. See *Thayer v. Middlesex Mut. F. Ins. Co.*, 27 Mass. (10 Pick.) 332; *Martin v. Frith*, 6 Wend. (N. Y.) 103; *Chinnock v. Marchioness of Ely*, 4 De G., J. & S. 638.

Intent of the parties. — Whether negotiations amount to a contract is to be determined from the intention of the parties. See *Eskridge v. Glover*, 5 Stew. & Port. (Ala.) 264; s. c. 56 Am. Dec. 344; *Ricketts v. Hays*, 13 Ind. 181; *Carlisle v. Wal-*

lace, 12 Ind. 252; *Johnson v. McLane*, 7 Blackf. (Ind.) 501; s. c. 43 Am. Dec. 103; *Train v. Gold*, 22 Mass. (5 Pick.) 380; *Smith v. Clark*, 21 Wend. (N. Y.) 83; s. c. 34 Am. Dec. 213; *Johnston v. Fessler*, 7 Watts (Pa.) 48; s. c. 32 Am. Dec. 738; *Boyd v. Moyle*, 2 C. B. 644; *Johnston v. Nicholls*, 1 C. B. 251. And it has been said that to render a proposed contract binding, it must be acceded to by both parties at the time; that a mere voluntary compliance with its terms, by one who had not previously agreed to it, does not render the other liable upon it. *Johnston v. Fessler*, 7 Watts (Pa.) 48; s. c. 32 Am. Dec. 738; but see "Assent by Performance," *ante*, sec. 48, note 1.

Offer of reward. — It has been said that if a reward be offered for the apprehension of a criminal, or for the doing of any other lawful act, the promise, when made, is *nudum pactum*; but that when any one relying on the promised reward, performs the condition, this is a good consideration for the previous promise, and it therefore becomes binding upon the promisor. *Train v. Gold*, 22 Mass. (5 Pick.) 380. And where the offer is made to pay a sum of money to any person, who will do a particular thing, the promise will become binding if the act is performed before recovery, although the party does not, at the time, engage to do the act (*Barnes v. Perine*, 9 Barb. (N. Y.) 202. See *Hilton v. Southwick*, 17 Me. 305; s. c. 35 Am. Dec. 253; *Chapin v. Lapham*, 37 Mass. (20 Pick.) 467; *Hamilton College v. Stewart*, 1 N. Y. 585); provided it be done within a reasonable time. *Loring v. Boston*, 48 Mass. (7 Metc.) 409.

By advertisement. — A reward offered by public advertisement will be binding when accepted and acted upon by any one. *Crocker v. New London, W. & P. R. R. Co.*, 24 Conn. 249, 261; *Freeman v. Boston*, 46 Mass. (5 Metc.) 56, 57. Because the performance of the service is a sufficient considera-

tion to support the promise and make it binding upon the one offering. *Crocker v. New London, W. & P. R. R. Co.*, 24 Conn. 261; *Eagle v. Smith*, 4 Houst. (Del.) 293; *County of Montgomery v. Robinson*, 85 Ill. 174; *Jenness v. Mount Hope Iron Co.*, 53 Me. 20, 23; *Smith v. Gowdy*, 90 Mass. (8 Allen) 566; *Allcott v. Boston Steam Flour Co.*, 63 Mass. (9 Cush.) 17; *Craig v. Harper*, 57 Mass. (3 Cush.) 158; *Loring v. Boston*, 48 Mass. (7 Metc.) 409; *Beckwith v. Cheever*, 21 N. H. 41; *Pierson v. Morch*, 82 N. Y. 503; *Tucker v. Woods*, 12 Johns. (N. Y.) 190; s. c. 7 Am. Dec. 305; *Burnet v. Bisco*, 4 Johns. (N. Y.) 534; *Grady v. Crook*, 2 Abb. (N. Y.) N. C. 53. And an action lies to recover such reward. *England v. Davidson*, 11 Ad. & E. 856; *Williams v. Carwardine*, 4 Barn. & Ad. 621; *Neville v. Kelly*, 12 C. B. (N. S.) 740; *Thatcher v. England*, 3 C. B. 254; *Smith v. Moore*, 1 C. B. 438; *Fallick v. Barber*, 1 Marsh & S. 108; *Lancaster v. Walsh*, 4 Mees. & W. 16; *Turner v. Walker*, L. R. 2 Q. B. 301; s. c. L. R. 1 Q. B. 641. In *Loring v. Boston*, 48 Mass. (7 Metc.) 411, the court say: "The offer of a reward for the detection of an offender, the recovery of property, and the like, is an offer or proposal on the part of the person making it to all persons, which any one capable of performing the service may accept any time before it is revoked, and perform the service; such an offer on one side, and acceptance and performance of the service on the other, is a valid contract, made on a good consideration, which the law will enforce." See *Crawshaw v. Roxbury*, 73 Mass. (7 Gray) 374; *Freeman v. Boston*, 46 Mass. (5 Metc.) 56; *Wentworth v. Day*, 44 Mass. (3 Metc.) 352; s. c. 37 Am. Dec. 145; *Symmes v. Frazier*, 6 Mass. 344; *Furman v. Parke*, 21 N. J. L. (1 Zab.) 310; *Gilmore v. Lewis*, 12 Ohio, 281; *Denton v. Great N. Ry. Co.*, 5 El. & Bl. 860, 865, 868.

must also *co-exist at the same moment of time*.^{2a} A mere proposal by one obviously constitutes no bargain of itself.³

^{2a} *Sale "on request."* — An acceptance of an order for a certain quantity of steel, to be taken out on or before a certain date, at designated prices for different kinds of steel, but without naming the amounts of each kind, the terms to be four months from date of invoice, constitutes a sale of goods on request, and an execution sale thereof as the property of the vendor will not operate as waiver of demand. *Spratt v. Merchants' & M. Nat. Bank (Pa.)* 5 Cent Rep. 286.

Where a verbal warranty was a part of the preliminary negotiations, which were afterwards consummated by execution of a written and printed order for the machinery, which was accepted, it became a mutual binding contract on both parties. *Brown v. Russell*, 105 Ind. 46; s. c. 2 West. Rep. 666, 669; *Chicago & A. Ry. Co. v. Derkes*, 103 Ind. 520; s. c. 1 West. Rep. 553; *Herman v. Babcock*, 103 Ind. 461; s. c. 1 West. Rep. 477; *Fairbanks v. Meyers*, 93 Ind. 92.

³ *A proposal.* — A mere proposal, or offer, constitutes no bargain of itself (see *Leigh v. Mobile & O. R. R. Co.*, 58 Ala. 165, 174; *Smith v. Weaver*, 90 Ill. 392; *Whitmore v. Alley*, 46 Me. 428, 431; *Chamberlain v. Smith*, 44 Pa. St. 431; *Bruce v. Bishop*, 43 Vt. 161, 163), and imposes no obligation until accepted according to its terms (*Minneapolis & St. L. R. Co. v. Columbus Rolling Mill Co.*, 119 U. S. 149; bk. 30, L. ed. 376), because it is nothing more than a treaty or negotiation for a sale. *Carr v. Duval*, 39 U. S. (14 Pet.) 77; bk. 10, L. ed. 361. The offer must be definite, leaving nothing to be settled by future arrangements; otherwise it is simply a proposal to enter into an agreement. *Lincoln v. Erie Preserving Co.*, 132 Mass. 129; *Potts v. Whitehead*, 20 N. J. Eq. (5 C. E.

Gr.) 55; s. c. 23 N. J. Eq. (8 C. E. Gr.) 512; *Dominion Bank v. Knowlton*, 25 Grant (Ont.) 125; *Chinnock v. Marchioness of Ely*, 4 De Gex., J. & S. 638; *Rummens v. Robins*, 3 De Gex, J. & S. 88.

Notice to the trade. — It is held that a price list is a mere proposition, which may be withdrawn at pleasure, where it has not been accepted on the terms offered before notice of withdrawal. *Schenectady Stove Co. v. Holbrook*, 4 N. E. Rep. 4. But it has been said that a letter, stating that the senders were "authorised to offer" goods on certain terms, is not such an offer to sell as will on a telegraphic reply, accepting the terms, bind the party for any amount the persons to whom the letter was addressed might see fit to order. *Keller v. Ybarru*, 3 Cal. 147; *Beaupre v. Pacific & A. Tel. Co.*, 21 Minn. 155; *Moulton v. Kershaw*, 95 Wis. 316; s. c. 48 Am. Rep. 516, 519; *Kinghorne v. Montreal Tel. Co.*, 18 Up. Can. Q. B. 60.

Quotations and statement of price. — A distinction is made between an offer to sell and a price named. *Beaupre v. Pacific & Atl. Tel. Co.*, 21 Minn. 155; *Moulton v. Kershaw*, 59 Wis. 316; s. c. 48 Am. Rep. 516, 519.

Withdrawal of offer. — Where an offer has been made by publication or otherwise, it may be withdrawn or revoked before acceptance. *Crocker v. New London, W. & P. R. R. Co.*, 24 Conn. 249, 261; *Freeman v. Boston*, 46 Mass. (5 Metc.) 56.

"Statement of price." — Merely naming the price at which the goods will be sold in response to the inquiry from a purchaser, does not constitute an agreement to sell to him at that price. *Smith v. Gowdy*, 90 Mass. (8 Allen) 566; *Slaymaker v. Irwin*, 4 Whart. (Pa.) 369; *Moulton v. Kershaw*, 59 Wis. 316; s. c. 48 Am. Rep.

516, 519; *Beaupre v. Pacific & Atl. Tel. Co.*, 21 Minn. 155.

Ambiguity. — It is a well-settled rule that in ascertaining the meaning of a written offer of sale, all its parts and words must be examined in the light of the circumstances, and, if possible, effect given to each; and where such writing may have different meanings, and the receiver of such writing, on inquiry of a third person, is given the true intent and meaning of the sender of the same, and such person without further inquiry, acts upon the same and then seeks to hold the sender upon such writing, he is bound by the true intent and meaning of the sender; and where a proposition to sell goods is sent by a writing that, by mistake, is ambiguous, and the receiver knowing of such ambiguity, claims an improbable meaning, unreasonably favorable to himself, and not intended or thought of by the sender, and without notice to the sender of his interpretation of the mistaken proposition, or inquiry of him as to his intended meaning, orders goods, obtains, and uses them, such receiver of the goods will be liable to the seller for the value thereof as though no proposition had been sent. *Butler v. Moses*, 4 Ohio St. 166.

Agreement to put in writing where it is a part of the offer or acceptance, there will be no contract binding upon the parties until this is done. *Vide ante*, sec. 47, note 9. However, this is not the case where the parties actually conclude an agreement intending to be bound by it, but contemplating a more formal expression of their contract. See *Chinnock v. Marchioness of Ely*, 4 De G., J. & S. 638, 645; *Kennedy v. Lee*, 3 Meriv. 441; *Fowle v. Freeman*, 9 Ves. 851; *Ridgway v. Wharton*, 6 H. L. Cas. 237, 264, 268; *Powell v. Dillon*, 2 Ball. & B. 416; *Thomas v. Dering*, 1 Keen. 729; *Verlander v. Codd*, 1 Turn. & Russ. 352. Neither does a contemporaneous agreement to re-

duce to writing make the validity depend upon a reduction to writing and signing. *Bell v. Offutt*, 10 Bush (Ky.) 632. In the case of *Fowle v. Freeman*, *supra*, the parties had been negotiating for the sale and purchase of a large estate, and finally, there having been some previous negotiations which they did not need in an agreement, they met together and Freeman signed a document which read as follows: "I agree to sell to Mr. Fowle my estate, booths, and manor at Chute Lodge, together with the woods, trees, and fixtures (except Cadley cottage), for the sum of 2700*l*., upon the following conditions," the conditions being fully set out. After signing the instrument Freeman addressed a letter to his solicitor desiring him to prepare a proper agreement for Mr. Freeman and himself to sign. This was held to be a valid agreement to all intents and purposes.

Signing by the party to be charged is necessary only in those cases where the contract is within the Statute of Frauds. *Bell v. Offutt*, 10 Bush (Ky.) 632; *Peck v. Miller*, 39 Mich. 594; *Pratt v. Hudson R. R. R.*, 21 N. Y. 305; *Wharton v. Stoutenburgh*, 35 N. J. Eq. (8 Stew.) 266, 273; *Blaney v. Hoke*, 14 Ohio St. 292; *Mackey v. Mackey*, 29 Gratt. (Va.) 158; *Blight v. Fisher*, Pet. C. C. 15; *Thomas v. Dering*, 1 Keen. 729; s. c. 15 Eng. Ch. 729. Thus if two persons enter into a verbal agreement about a matter, it would be no defence when one of them is sued for a breach of the contract that he understood that it would not be obligatory unless reduced to writing. And neither does a contemporaneous agreement to reduce a contract to writing make its validity depend upon its being actually reduced to writing and signed; because an agreement to reduce a contract to writing is merely an agreement to provide a particular kind of evidence as to the terms of the contract. *Bell v. Offutt*, 10 Bush (Ky.) 632.

It must be accepted^{3a} by another, and this acceptance must be *unconditional*.⁴ If a condition be affixed by the party

^{3a} *Time of acceptance.* — An offer must be accepted within a reasonable time, where no time is fixed; the question as to what is a reasonable time is to be determined from a consideration of all the circumstances connected with the transaction. *Averill v. Hedge*, 12 Conn. 424; s. c. 1 Langdell's Cas. on Contr. 90; *Craig v. Harper*, 57 Mass. (3 Cush.) 158, 160; *Loring v. City of Boston*, 48 Mass. (7 Metc.) 409, 412; s. c. 1 Langdell's Cas. on Contr. 99; *Chicago & C. R. R. Co. v. Dane*, 43 N. Y. 240, 243; *Trevor v. Wood*, 36 N. Y. 307; s. c. 3 Abb. (N. Y.) Pr. N. S. 355; reversing s. c. 41 Barb. (N. Y.) 255; *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill. C. C. 431. But what is a reasonable time must be determined in each instance from the circumstances; no precise time can be fixed upon as a reasonable time. *Loring v. Boston*, 48 Mass. (7 Metc.) 409, 414. An acceptance within four months (*Chicago & G. E. R. R. Co. v. Dane*, 43 N. Y. 240), and within eight months (*Field v. Nickerson*, 13 Mass. 131), is not an acceptance within reasonable time. Where a proposition gives time in which to accept it, no definite time being specified, it must be accepted within a reasonable time. *Martin v. Black*, 21 Ala. 721; *Beckwith v. Cheever*, 21 N. H. 41.

⁴ *Assent must be unconditional and unqualified* in order to bind the party making the offer (*Hutcheson v. Blakeman*, 3 Met. (Ky.) 80; *Eliason v. Henshaw*, 17 U. S. (4 Wheat.) 225; bk. 4, L. ed. 256; *Hazard v. New England Marine Ins. Co.*, 1 Sumn. C. C. 218; *Appleby v. Johnson*, L. R. 9 C. P. 158; *Duke v. Andrews*, 2 Ex. 290, 296), and must correspond in every respect with the terms of the offer (*Potts v. Whitehead*, 23 N. J. Eq. (8 C. E. Gr.) 512; *McKibbin v. Brown*, 14 N. J. Eq. (1 McC.) 13; s. c.

15 N. J. Eq. (2 McC.) 498; *Summers v. Mills*, 21 Tex. 77; *Carr v. Duval*, 39 U. S. (14 Pet.) 77; bk. 10, L. ed. 361; *Eliason v. Henshaw*, 17 U. S. (4 Wheat.) 225; bk. 4, L. ed. 556; *Routledge v. Grant*, 4 Bing. 653; *Hutchinson v. Bowker*, 5 Mees. & W. 535; *Kennedy v. Lee*, 3 Meriv. 441; *Huddleston v. Briscoe*, 11 Ves. 583; *Honeyman v. Marryatt*, 6 H. L. Cas. 112); at least, no material condition must be added in the acceptance. *MacLay v. Harvey*, 90 Ill. 525; s. c. 32 Am. Rep. 35; *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80; *Maynard v. Tabor*, 53 Me. 511; *Eggleson v. Wagner*, 46 Mich. 610; *Myers v. Smith*, 48 Barb. (N. Y.) 614; *North Western Iron Co. v. Meade*, 21 Wis. 474; *Carr v. Duval*, 39 U. S. (14 Pet.) 77; bk. 10, L. ed. 361; *Snow v. Miles*, 3 Cliff. C. C. 608. Thus where goods are ordered and a less quantity shipped than was specified, there is no contract. *Bruce v. Pearson*, 3 Johns. (N. Y.) 534. And see *Plant Seed Co. v. Hall*, 14 Kan. 553; *Jenness v. Mt. Hope Iron Co.*, 53 Me. 20; *Corning v. Colt*, 5 Wend. (N. Y.) 253; *McMillan v. Malloy*, 10 Neb. 228; s. c. 35 Am. Rep. 471; *Avery v. Wilson*, 81 N. Y. 341; s. c. 37 Am. Rep. 503; *Hughes v. The Mercantile Mut. Ins. Co.*, 55 N. Y. 265, 268; s. c. 14 Am. Rep. 254; *Leeds v. Dunn*, 10 N. Y. 469; *Corning v. Colt*, 5 Wend. (N. Y.) 253, 256; *Bruce v. Pearson*, 3 Johns. (N. Y.) 528; *Wontner v. Shairp*, 4 C. B. 440, 441; *Chapin v. Clark*, 4 Ex. 403, 409; *Duke v. Andrews*, 2 Ex. 290, 296; *Crossley v. Maycock*, L. R. 18 Eq. 180, 181; *Beck's Case*, L. R. 9 Ch. Cas. 392. And it has been held that conditions of small importance may prevent the consummation of contracts by correspondence. *MacLay v. Harvey*, 90 Ill. 525; s. c. 32 Am. Rep. 35; *Merriam v. Lapsley*, 2 McCr. C. C. 606, 607. In all cases the assent must be direct,

unconditional, unqualified. *Corcoran v. White*, 117 Ill. 118; s. c. 7 New Eng. Rep. 525; *Clay v. Ricketts*, 66 Iowa, 362; s. c. 23 N. W. Rep. 755; *Hutcheson v. Blakeman*, 3 Met. (Ky.) 30; *Baker v. Holt*, 56 Wis. 100, 103; *Tayloe v. Merchants' Fire Ins. Co.*, 50 U. S. (9 How.) 390; bk. 13, L. ed. 187; s. c. 1 Lang. Cas. Contr. 106, 109; *Eliason v. Henshaw*, 17 U. S. (4 Wheat.) 225; bk. 4, L. ed. 556; s. c. 1 Lang. Cas. Contr. 70, 71. Compare *Stanley v. Dowdswell*, L. R. 10 C. P. 102. The acceptance must be entirely in accordance with the terms and conditions of the purpose in order to bind the party making the offer. Thus where an offer was made to sell malt "delivered" on the boat, an acceptance "deliverable" on the boat is not binding. *Myers v. Smith*, 48 Barb. (N. Y.) 614, 634. See, also, *Clark v. Dales*, 20 Barb. (N. Y.) 42.

Assent must correspond with offer.—The parties must assent to the same thing in the same sense, to constitute a contract. See *Thomas v. Blackman*, 1 Colo. 301, 312; *Dana v. Short*, 81 Ill. 468; *Stagg v. Compton*, 81 Ind. 171; *Cartmel v. Newton*, 79 Ind. 1; *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80; *Lyman v. Robinson*, 96 Mass. (14 Allen) 242; *Johnson v. Stephenson*, 26 Mich. 63; *Butler v. Moses*, 43 Ohio St. 166, 171; *Summers v. Mills*, 21 Tex. 77, 86, 87; *Merriam v. Lapsley*, 2 McCr. C. C. 606; *Hazard v. New England Marine Ins. Co.*, 1 Sumn. C. C. 218; *Willing v. Currie*, 36 Up. Can. Q. B. 46; *McPherson v. Cameron*, 15 Up. Can. Q. B. 48; *Pierce v. Small*, 10 Up. Can. C. P. 161; *Chevely v. Fuller*, 13 C. B. 122; *Ridgway v. Wharton*, 6 H. L. Cas. 238, 268, 304. See, also, *Eliason v. Henshaw*, 17 U. S. (4 Wheat.) 225; bk. 4, L. ed. 556. The acceptance must comprehend the whole of the proposal, and be equal in extent to the provisions of the offer, not qualifying it by any addition or limitations. *Fox v. Turner*, 1 Ill. App. 153; *Hutcheson v. Blakeman*, 3 Met.

(Ky.) 80; *Potts v. Whitehead*, 23 N. J. Eq. (8 C. E. Gr.) 512, 514; *Stacy v. Ross*, 27 Tex. 3; *Summers v. Mills*, 21 Tex. 77, 86, 87; *Wynne's Case*, L. R. 7 Chan. Cas. 229. Thus an offer by letter to buy a horse, if warranted "sound and quiet in harness" is not met by a reply, stating that the animal is warranted to be "sound and quiet in double harness." *Jordan v. Norton*, 4 Mees. & W. 155, 161. Where a defendant offered, by letter, to sell "first quality Jefferson County barley," such letter is not accepted by a letter specifying "two-rowed barley." *Vassar v. Camp*, 11 N. Y. 441; s. c. 1 Langd. Cas. on Contr. 102. And where the plaintiffs, in a letter, offered a certain quantity of "good barley," upon certain terms, to which the plaintiffs replied, saying of the offer, "we accept, expecting you to give us *fine* barley of full weight," it was held that the reply was not an acceptance, it being in evidence of the trial that the terms "good" and "fine" were terms well known to the trade, and represented different kinds of barley. *Hutchison v. Bowker*, 5 Mees. & W. 535. Thus it was held in *Johnson v. Stevenson*, 26 Mich. 63, that an offer to sell and deliver goods at a certain time and place, was not duly accepted by an answer changing the time of delivery, though in all other respects corresponding with the offer. And an offer to sell a specified quantity of butter at a given price, has been held not accepted by a reply, "will take your butter at twenty cents, *if good*." *McIntosh v. Brill*, 20 Up. Can. C. P. 426. And see *Carter v. Bingham*, 32 Up. Can. Q. B. 615. And it is held in the case of the *Minneapolis & St. L. R. R. Co. v. Columbus Rolling Mill*, 119 U. S. 149, that an offer to sell a given quantity is not made binding by a reply ordering a less quantity. Such modified offer closes the negotiations, and the original offer cannot afterwards be accepted unless renewed. *Salomon v. Webster*,

to whom the offer is made, or any modification⁵ or change in the offer be requested, this constitutes in law a rejection of the offer⁶ and a new proposal,⁷ equally ineffectual to com-

4 Colo. 353; *Fox v. Turner*, 1 Ill. App. 153; *Cartmel v. Newton*, 79 Ind. 1; *McCotter v. Mayor*, 37 N. Y. 325; *Baker v. Holt*, 56 Wis. 100; *Merriam v. Lapsley*, 2 McCr. C. C. 606; *Minneapolis & St. L. R. R. Co. v. Columbus Rolling Mill*, 119 U. S. 149; *Fulton Brothers v. Upper Canada Furniture Co.*, 9 Ont. App. 211; *Hyde v. Wrench*, 3 Beav. 334.

Although the parties must assent to the same subject-matter in the same sense (*Falls v. Gaither*, 9 Port. (Ala.) 605; *Keller v. Ybarru*, 3 Cal. 147; *Hartford & N. H. R. R. Co. v. Jackson*, 24 Conn. 514; s. c. 63 Am. Dec. 177; *Holtzman v. Millaudon*, 18 La. An. 29; *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80; *Gibbs v. Linabury*, 22 Mich. 490; s. c. 7 Am. Rep. 678; *Barlow v. Scott*, 24 N. Y. 40; *Tuttle v. Love*, 7 Johns. (N. Y.) 470; *Bruce v. Pearson*, 3 Johns. (N. Y.) 534; *Hedge's Appeal*, 63 Pa. St. 273; *Eliason v. Henshaw*, 17 U. S. (4 Wheat.) 225; bk. 4, L. ed. 556; *Hazard v. New Eng. Marine Ins. Co.*, 1 Sum. C. C. 218; *Greene v. Bateman*, 2 Woodb. & M. C. C. 359, 361; *Hamilton v. Terry*, 11 C. B. 954; s. c. 10 Eng. L. & Eq. 473; *Hutchison v. Bowker*, 5 Mees. & W. 535), — yet this assent need not be expressed, but may be inferred from the circumstances of the transaction. *Bruce v. Tallton*, 4 Ont. App. 144; *Joyce v. Swann*, 17 C. B. N. S. 84; s. c. 112 Eng. C. L. 84. See *Browne v. Hare*, 4 Hurls. & N. 822; *Wait v. Baker*, 2 Ex. 1.

Immaterial addition to the proposal will not prevent the taking effect of the contract. *Phillips v. Moor*, 71 Me. 78, 79; *Proprietors v. Arduin*, L. R. 5 H. L. Eng. & Ir. App. 64, and the like. See *Gibbons v. Board &c.*, 11 Beav. 1; *Clive v. Beaumont*, 1 De G. & S. 397, 403; *Bransom v. Stannard*, 41 L. T. N. S. 434, 435; *Bonnewell v.*

Jenkins, 38 L. T. N. S. 531, 532. Thus a mere expression of a hope that the vendee will pay a greater sum for the article, when hauled, does not vary the contract. *Phillips v. Moor*, 71 Me. 78. Whether the addition is material or varies the proposal, depends upon whether it introduces a material element into the contract. *O'Neill v. James*, 43 N. Y. 84; *Clark v. Dales*, 20 Barb. (N. Y.) 42; *Brisban v. Boyd*, 4 Paige Ch. (N. Y.) 17; *Fitzhugh v. Jones*, 6 Munf. (Va.) 83; *Matteson v. Scofield*, 27 Wis. 671.

⁵ *Varying terms of proposal a rejection.* — Mutual assent of the parties being as indispensable to the modification of the contract already made as it is to the making of an original contract (see *Murray v. Harway*, 56 N. Y. 347; *Utey v. Donaldson*, 94 U. S. (4 Otto) 29; bk. 24, L. ed. 54; *Robinson v. Page*, 3 Russ. 122), therefore a proposal to accept, or an acceptance of the contract upon terms different from those proposed is a rejection of the proposition, and terminates the negotiation. *Jenness v. Mount Hope Iron Co.*, 53 Me. 20, 23; *Fox v. Turner*, 1 Ill. App. 153; *Minneapolis & St. L. R. Co. v. Columbus Rolling Mill Co.*, 119 U. S. 149; bk. 30, L. ed. 376; *National Bank v. Hall*, 101 U. S. (11 Otto) 43, 50; bk. 25, L. ed. 822, 825; *Carr v. Duval*, 39 U. S. (14 Pet.) 77; bk. 10, L. ed. 361; *Eliason v. Henshaw*, 17 U. S. (4 Wheat.) 225; bk. 4, L. ed. 556; *Hyde v. Wrench*, 3 Beav. 334; s. c. 1 Langd. Cas. on Contr. 13.

⁶ *Fox v. Turner*, 1 Ill. App. 153; *Webb v. Sharman*, 34 Up. Can. Q. B. 416; *Carter v. Bingham*, 32 Up. Can. Q. B. 615.

⁷ See *Jenness v. Mount Hope Iron Co.*, 53 Me. 20, 23.

plete the contract until assented to by the first proposer.⁸ Thus, if the offer by the intended vendor be answered by a proposal to give a less sum, this amounts to a rejection of the offer, which is at an end, and the party to whom it was made cannot afterwards bind the intended vendor by a simple acceptance of the first offer.⁹

⁸ *Fox v. Turner*, 1 Ill. App. 158, 159; *Hyde v. Wrench*, 3 Beav. 334; s. c. 1 Langd. Cas. on Contr. 13.

⁹ *Esmay v. Gorton*, 18 Ill. 483; *Steel v. Miller*, 40 Iowa, 402; *Plant Seed Co. v. Hall*, 14 Kan. 553; *Cumberland Bone Co. v. Atwood Lead Co.*, 63 Me. 167; *Belfast, &c. R. R. v. Unity*, 62 Me. 148; *Jenness v. Mount Hope Co.*, 53 Me. 20; *Harlow v. Curtis*, 121 Mass. 320; *Gowing v. Knowles*, 118 Mass. 232; *Eberts v. Selover*, 44 Mich. 519; *Johnson v. Stephenson*, 26 Mich. 63; *Lanz v. McLaughlin*, 14 Minn. 72; *Bruner v. Wheaton*, 46 Mo. 363; *Potts v. Whitehead*, 23 N. J. Eq. (8 C. E. Gr.) 512; *Demuth v. American Institute*, 75 N. Y. 502; *Corning v. Colt*, 5 Wend. (N. Y.) 253; *Borland v. Guffey*, 1 Grant (Pa.) 394; *Johnston v. Fessler*, 7 Watts (Pa.) 48; *Fenno v. Weston*, 31 Vt. 345; *N. W. Iron Co. v. Meade*, 21 Wis. 474; *Bank v. Hall*, 101 U. S. (11 Otto) 43, 50; bk. 25, L. ed. 822, 826; *Utley v. Donaldson*, 94 U. S. (4 Otto) 29; bk. 24, L. ed. 54; *Carr v. Duval*, 39 U. S. (14 Pet.) 77; bk. 10, L. ed. 361; *Eliason v. Henshaw*, 17 U. S. (4 Wheat.) 225; bk. 4, L. ed. 556; *McIntosh v. Brill*, 20 Up. Can. C. P. 426; *Marshall v. Jamieson*, 42 Up. Can. Q. B. 115; *Webb v. Sharman*, 34 Up. Can. Q. B. 410; *Carter v. Bingham*, 32 Up. Can. Q. B. 615.

Manner of acceptance.—Where a proposal designates a manner in which it shall be accepted, the acceptance must be in that manner, or the contract will not be binding, because the manner of acceptance is a condition of the proposal. *Barber v. Burrows*, 51 Cal. 404; *Eads v. City*

of Carondelet, 42 Mo. 113; *Bourney v. Shapleigh*, 9 Mo. App. 64; *Morrill v. Tehama Consolidated Mill and Mining Co.*, 10 Nev. 125; *Maitland v. Wilcox*, 17 Pa. St. 231; *Carr v. Duval*, 39 U. S. (14 Pet.) 77; bk. 10, L. ed. 361; *Eliason v. Henshaw*, 17 U. S. (4 Wheat.) 125; bk. 4, L. ed. 556. Thus where an answer by return mail is required, and the letter containing the acceptance of the offer is not sent by return mail, the offer will be considered as rejected. *Taylor v. Rennie*, 35 Barb. (N. Y.) 277; *Carr v. Duval*, 39 U. S. (14 Pet.) 77; bk. 10, L. ed. 361; *Eliason v. Henshaw*, 17 U. S. (4 Wheat.) 225; bk. 4, L. ed. 556. In *Eliason v. Henshaw*, *supra*, the court say, "An acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposes no obligation binding upon them unless they had acquiesced in it." This doctrine rests upon the well-established principle that where there is no variation from or qualification of the terms of the proposal, there is no binding agreement. *Ocean Ins. Co. v. Carrington*, 3 Conn. 357; *Myers v. Keystone Mutual L. Ins. Co.*, 27 Pa. St. 268; s. c. 67 Am. Dec. 462; *Carr v. Duval*, 39 U. S. (14 Pet.) 77; bk. 10, L. ed. 361; *Head v. Providence Ins. Co.*, 6 U. S. (2 Cr.) 127; bk. 2, L. ed. 229; *Snow v. Miles*, 3 Cliff. C. C. 608.

Partial assent.—To render it effective and binding the assent must be full, complete, and unconditional. See *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80, 82; *Appleby v. Johnson*, L. R. 9 C. P. 158; *Duke v. Andrews*, 2 Ex. 290, 296. Where the details

[The assent must either be *communicated*¹⁰ to the other party, or some act must have been done which the other

are to be arranged, it is not a complete acceptance, and there is no contract. *Northam v. Gordon*, 46 Cal. 582; *Lyman v. Robinson*, 96 Mass. (14 Allen) 254; *McKibbin v. Brown*, 14 N. J. Eq. (1 McCar.) 13; *Brown v. New York Central R. R.*, 44 N. Y. 79; *Bigley v. Risher*, 63 Pa. St. 152; *Brown v. Finney*, 53 Pa. St. 373; *Ridgeway v. Wharton*, 6 H. L. Cas. 268. The New York Court of Appeals say, in *Brown v. New York Central R. R.*, *supra*, that "a valid contract may doubtless be made by correspondence, but care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation. The question in such cases always is, Did they mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they designed to be bound?" However, where a proposal is accepted, the contract afterwards to be reduced to writing, a mere disagreement in regard to the terms of the contract, on attempting to reduce it to writing, where the contract is executed by both parties, will be binding upon them. *Peck v. Miller*, 39 Mich. 594; *Blight v. Ashley*, 1 Pet. C. C. 41.

Implied assent to a proposition cannot be presumed until after the matter has been brought to the attention of the vendee. *Dudley v. Deming*, 34 Conn. 169; *Ball v. Newton*, 61 Mass. (7 Cush.) 599; *McCutchin v. Platt*, 22 Wis. 561; *Welch v. Sackett*, 12 Wis. 243. Although the law presumes that a party will accept that which is for his benefit. See *Welch v. Sackett*, 12 Wis. 243, 259; *Stirling v. Vaughan*, 11 East, 623.

¹⁰ *The assent must be communicated*

to the party making the proposal actually or constructively. *Jenness v. Mount Hope Iron Co.*, 53 Me. 20; *Beckwith v. Cheever*, 21 N. H. (1 Fost.) 41; *White v. Corlies*, 46 N. Y. 467; *Emerson v. Graff*, 29 Pa. St. 358; *Borland v. Guffey*, 1 Grant (Pa.) 394; *The Navan Union v. McLaughlin*, 4 Ir. C. L. R. 451. It is said in *White v. Corlies*, *supra*, that in order to constitute an agreement, there must be a proposition by one accepted by the other; and when the parties are not together, that the acceptance must be manifested by some appropriate act and such manifestation put in the proper way of writing and proposal, a mere mental determination to accept not indicated by speech or put in course of indication by act, is not an acceptance. Nor does the act which in itself is no indication of acceptance, because accompanied by an unevinced mental determination. In this instance Corlies wrote to White on the strength of former negotiations, saying: "Upon your agreement to fit up my office, 57 Broadway, in two weeks, you can begin at once." Without replying, White bought lumber and commenced work, and Corlies without knowing it, countermanded the order. The court held that there was no complete contract, for want of notice of acceptance on the part of White. In *Beckwith v. Cheever*, 21 N. H. (1 Fost.) 41, one Bellows, who owned a lot of land, on which some hemlock trees were growing, proposed to sell them to Beckwith, who said he would accept the offer, if his brother would help him in the payment, to which Bellows replied, that he need not give him a decided answer, but might do so thereafter. Whereupon they separated, with the understanding that Beckwith might go upon the land, cut and haul the timber, without seeing Bellows fur-

party has expressly or impliedly offered to treat as a communication, as, *e.g.* in contracts by correspondence¹¹ the posting of the letter of acceptance¹¹ or the assent may be inferred from subsequent conduct;¹² but an assent which is neither communicated to the other party nor followed up by action, a mere "mental assent," as it is termed, is insufficient.¹³]

The cases are very numerous¹⁴ in support of these

ther on the subject. Beckwith's brother agreed to assist him, but Bellows was never notified of the fact, and subsequently sold the timber to Cheever. The court held that there was no sale to Beckwith, because of his failure to notify Bellows within a reasonable time of his acceptance. In the course of the opinion, the court say, referring to the fact that the plaintiff was to inform Bellows, at some future day, whether he would accept the offer or not, "This should have been done within a reasonable time; and the proper time would have been whenever the plaintiff should determine to accept the proposition. . . . It cannot with propriety be said that the fact that the plaintiff had engaged his brother to assist him, not brought home to the knowledge of B., can be regarded as an acceptance. Neither party did anything to make the proposition binding, and neither was bound."

Vide infra, p. 48, § 54, note 2.

¹¹ *Vide infra*, § 54, note 1.

¹² See *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80, 82; *Appleby v. Johnson*, L. R. 9 C. P. 158; *Duke v. Andrews*, 2 Ex. 290, 296.

¹³ *Mental assent or uncommunicated acceptance.*—In a case where A. sent goods to B. to be purchased by him or sold on A.'s account, as B. should elect, in an action of replevin, brought by A. against B. for the goods, it was held that B. was properly allowed to testify that he had decided to exercise his option and elected to purchase the goods.

Yeager Milling Co. v. Brown, 128 Mass. 171. But the doctrine in this case is open to serious question for two reasons: (1) because an option to pay is a mere offer, and in no sense a contract (see *Hunt v. Wyman*, 100 Mass. 198); (2) because it holds that an uncommunicated or mental assent is sufficient to close a contract and bind a vendor. A man's mental processes are not cognizable, and to make the validity of contracts and title to property rest upon them is to throw the door wide open to fraud and impositions. We find in the Year Books that as early as the reign of Edward IV. it was settled for English-speaking people that the thoughts of a man are not triable in a court of justice. Chief Justice Brian said in *T. Pasch, Cas.*, Year Book, 17 Edward IV. 2, that "it is trite law that the thought of a man is not triable, for even the devil does not know what the thought of man is." See, also, *McCall v. Powell*, 64 Ala. 254; *Jenness v. Mount Hope Iron Co.*, 53 Me. 20; *McCulloch v. Eagle Insurance Co.*, 18 Mass. (1 Pick.) 278; *Shupe v. Galbraith*, 32 Pa. St. 10; *Brogden v. Metropolitan Ry. Co.*, L. R. 2 App. Cas. 666, 692.

¹⁴ *Champion v. Short*, 1 Camp. 63; *Routledge v. Grant*, 4 Bing. 653; *Hutchinson v. Bowker*, 5 M. & W. 535; *Jordan v. Norton*, 4 M. & W. 155; *Wontner v. Sharp*, 4 C. B. 404; *Duke v. Andrews*, 2 Ex. 290; *Chaplin v. Clarke*, 4 Ex. 403; *Foster v. Rowland*, 7 H. & N. 103, and 30 L. J. Ex. 376; *Honeyman v. Marryat*, 6 H.

[*41] *principles, which are common to all contracts.¹⁵ A few only of those peculiarly illustrative of the rules as applied to contracts of sale need be specially noticed.

§ 48. In *Hutchinson v. Bowker*,¹ the defendant wrote an offer to sell a cargo of *good* barley; the plaintiff replied: "Such offer we accept, expecting you will give us *fine* barley, and *full weight*." The defendant wrote back: "You say you expect we shall give you 'fine barley.' Upon reference to our offer you will find no such expression. As such, we must decline shipping the same." It was shown on the trial that *good* barley and *fine* barley were terms well known in the trade, and that *fine* barley was the heavier. The jury,

L. C. 112; *Andrews v. Garrett*, 6 C. B. N. S. 262; *Proprietors Eng. & For. Cr. Co. v. Arduin*, L. R. 5 H. L. 64; *Addinel's Case*, 1 Eq. 225, aff. in H. L. sub. nom. *Jackson v. Turquand*, L. R. 4 H. L. 395; *Crossley v. Maycock*, 18 Eq. 180, and cases there cited; *Appleby v. Johnson*, L. R. 9 C. P. 158; *Stanley v. Dowdeswell*, L. R. 10 C. P. 102; *Wynne's Case*, 8 Ch. 1002; *Beck's Case*, 9 Ch. 392; *Lewis v. Brass*, 3 Q. B. D. 667, C. A. Conversely, an uncommunicated revocation is, in point of law, no revocation at all. *Stevenson v. McLean*, L. R. 5 Q. B. Div. 346; s. c. 29 Eng. Rep. 341; *Byrne v. Van Tienhoven*, 49 L. J. C. P. 313. See *Snyder v. Leibengood*, 4 Pa. St. 305; *Johnson v. Fessler*, 7 Watts (Pa.) 48; s. c. 32 Am. Dec. 738; *Clark v. Russel*, 3 Watts (Pa.) 213; s. c. 27 Am. Dec. 348.

¹⁵ *Intent to sell* is necessary on the one part and to purchase on the other; consequently where there is no intention that title shall be transferred in reality, but only in appearance, it is a colorable sale, and no title passes to the purchaser. *Bradley v. Hale*, 90 Mass. (8 Allen) 59; *Cox v. Jackson*, 88 Mass. (6 Allen) 108; *Weston's Case*, L. R. 6 Eq. 238; s. c. L. R. 4 Ch. App. 20; *Hyam's Case*, 1 De G. F. & J. 75; *Bowes v.*

Foster, 2 Hurls. & N. 779; *Ex parte Hunt*, 2 N. R. 50; *In re National Assurance & Investment Co.*, 1 N. R. 5. *Vide infra*, p. *467, § 617, note 6. Mere loose conversation by way of banter, jest, or negotiation, without any definite intention to make an agreement, will not constitute a contract of sale, although it may assume such a shape. *Thruston v. Thornton*, 55 Mass. (1 Cush.) 89, 93. In this case the court say, "It was a question for the jury to decide what was the meaning and intention of the parties. The conversation was loose and indefinite, and the jury, when they meet, will find that no contract was in fact made." But, although this may be, it was a question of fact for the jury. See *Bourne v. Shapleigh*, 9 Mo. App. p. 64; *Bruce v. Bishop*, 43 Vt. 161. And a paper signed, purporting to create a contract, may be shown to have been signed for another purpose, and that the parties had no intention of creating a binding contract. *Methudy v. Ross*, 10 Mo. App. 101; *Mildren v. Pennsylvania Steele Co.*, 90 Pa. St. 317; *Jones v. Littledale*, 6 Ad. & El. 486; *Rogers v. Hadley*, 2 Hurls. & C. 227; *Allen v. Pink*, 4 Mees. & W. 140. See *Moore v. Clementson*, 2 Campb. 22.

¹ 5 Mees. & W. 535.

although finding that there was a difference in the meaning of the two words, found a verdict for plaintiff. The Court held that it was for the jury to determine the meaning of the words, and for the Court to decide whether there had been mutual assent to the contract; and the plaintiff was nonsuited, on the ground that he had not accepted the defendant's offer.

In *Hyde v. Wrench*,² defendant offered to sell his farm to plaintiff for 1000*l.* The plaintiff, thereupon, offered him 950*l.*, which defendant refused. Plaintiff then accepted the offer at 1000*l.*, but defendant declined to complete the bargain. Held, on demurrer, by Lord Langdale, that when plaintiff, instead of accepting the first offer unconditionally answered it by a counter-proposal to purchase at a lower price, "he thereby rejected the offer," and that no contract had ever become complete between the parties.

[But a mere *inquiry*³ of the proposer whether he will agree to modify the terms of his offer, is not a counter-proposal entitling him to treat his offer as rejected. Thus, in *Stevenson v. McLean*,⁴ the defendant, being possessed of warrants for iron, wrote to the plaintiffs offering to sell them for "40*s.* nett cash, open till Monday. On the Monday *morning the plaintiffs telegraphed to the defendant, [*42] "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give." Held, not to be a refusal of the defendant's offer, and the plaintiffs having afterwards accepted the offer while it remained open, that the defendant was bound, and *Hyde v. Wrench* was distinguished.⁵]

² 3 Beav. 336.

³ A mere *inquiry* does not necessarily amount to a counter-proposal and a rejection of the offer. *Stevenson v. McLean*, L. R. 5 Q. B. Div. 346; s. c. 29 Eng. Rep. 341, 344.

⁴ 5 Q. B. D. 346.

⁵ *Counter-proposal* amounts to a rejection of the original offer. *Baker v. Johnson County*, 37 Iowa, 186; *Alsberg v. Latta*, 30 Iowa, 442; *Jenness v. Mount Hope Iron Co.*, 53 Me.

20, 23; *Hyde v. Wrench*, 3 Beav. 334; s. c. 1 Langd. Lead. Cas. on Contr. 16. An acceptance on different terms terminates a negotiation (*Hyde v. Wrench*, 3 Beav. 334; s. c. 1 Langd. Lead. Cas. on Contr. 16), and a subsequent acceptance on terms will not bind the proposer without his consent (*Fox v. Turner*, 1 Ill. App. 153; *Baker v. Johnson County*, 37 Iowa, 186; *Jenness v. Mount Hope Iron Co.*, 53 Me. 20, 23; *Eliason v. Hen-*

In *The Governor, Guardians, &c. of the Poor of Kingston-upon-Hull v. Petch*,⁶ plaintiffs advertised for tenders to supply meat, stating, "all contractors will have to sign a written contract after acceptance of tender." Defendant tendered, and received notice of the acceptance of his tender, and then wrote that he declined the contract. Held, that by the terms of the proposal, the contract was not complete till the terms were put in writing, and signed by the parties, and that the defendant had the right to retract.

In *Jordan v. Norton*,⁷ defendant offered to buy a mare, if warranted "sound, and quiet in harness." Plaintiff sent the mare, with warranty that she was "sound, and quiet in double harness." Held, no complete contract.

In *Felthouse v. Bindley*,⁸ a nephew wrote to his uncle that he could not take less than thirty guineas for a horse, for which the uncle had offered 30*l.* The uncle wrote back saying, "Your price I admit was thirty guineas, I offered 30*l.*, never offered more, and you said the horse was mine; however, as there may be a mistake about him I will split the difference, 30*l.* 15*s.*, I paying all expenses from Tamworth. You can send him at your convenience between now and the 25th of March. *If I hear no more about him, I consider the horse is mine at 30l. 15s.*" This letter was dated on the 2d of January; on the 21st of February the nephew sold all his stock at auction, the defendant being the auctioneer, but gave special orders not to sell the horse in question, saying it was his uncle's. The defendant by mistake sold the horse, and the action was trover by the uncle. Held,

[*43] *that there had been no complete contract between the uncle and the nephew, because the latter had never communicated to the former any assent to the sale at

shaw, 17 U. S. (4 Wheat.) 228; bk. 4, L. ed. 556; *Snow v. Miles*, 3 Cliff. C. C. 608), because the refusal of a proposition exhausts its force. *Leake Contr.* 22; *Sheffield Canal Co. v. Sheffield & Rotheram Ry. Co.*, 8 Ry. & Can. Cas. 121, 132; *Hyde v. Wrench*, 3 Beav. 334; *Honeyman v. Marryat*, 21 Beav. 14.

⁶ 10 Ex. 610, and 24 L. J. Ex. 23; *The New Brunswick, C. Ry. & L. Co. v. Muggeridge*, 4 Hurls. & N. 160, 580; *Bog Lead Mining Co. v. Montague*, 10 C. B. N. S. 481, 491.

⁷ 4 Mees. & W. 155.

⁸ 11 C. B. N. S. 868; 31 L. J. C. P. 204.

807. 15s.; that the uncle had no right to put upon his nephew the burden of being bound by the offer unless rejected; and that there was nothing up to the date of the auction sale to prevent the nephew from dealing with the horse as his own. The plaintiff, therefore, was nonsuited, on the ground that he had no property in the horse at the date of the alleged conversion.⁹

§ 49. [In *Appleby v. Johnson*,¹ the plaintiff wrote to the defendant proposing to enter his service as salesman upon certain terms, including, amongst others, a commission upon all sales to be effected by him: for which purpose a list of merchants with whom he should deal was to be prepared. The defendant replied as follows: "Yours of yesterday embodies the substance of our conversation and terms. If we can define some of the terms a little clearer, it might prevent mistakes; *but I think we are quite agreed on all.* We shall, therefore, expect you on Monday;" and in a postscript added, "I have made a list of customers, which we can consider together." Held, not to be an absolute and unconditional acceptance of the defendant's proposal.

This decision seems open to some criticism. The defendant's letter may fairly be read as a substantial acceptance of the plaintiff's offer, coupled with the expression of a desire that some of its terms should be more clearly defined and reduced into writing. It would then fall within the principle of that numerous class of cases² where the existence of a binding contract has been upheld, although the parties to the contract have contemplated a subsequent formal expression of its terms. Brett J. appears to have [*44] taken this view at the trial of the action: while Honeyman J. expressed reluctance in concurring in the judgment of the Court.]

⁹ It was further held in this case that the nephew's acceptance of the offer after conversion, but before the action brought by plaintiff, did not relate back to the date of the offer, so as to enable the plaintiff to maintain the action.

¹ L. R. 9 C. P. 158.

² *Crossley v. Maycock*, 18 Eq. 180; *Brogden v. Metropolitan Rail. Co.*, 2 App. Cas. at p. 672; *Lewis v. Brass*, 3 Q. B. D. 667, C. A.; *Rossiter v. Miller*, 3 App. Cas. 1124; *Bonnewell v. Jenkins*, 8 Ch. D. 70, C. A.

In *Watts v. Ainsworth*³ will be found a good illustration by Bramwell B. of the mode of construing a correspondence when a contest arises as to the existence of mutual assent. See also the opinions delivered in the House of Lords in the case of *The Proprietors of the English and Foreign Credit Company v. Arduin*, where the unanimous judgments of the Exchequer of Pleas, and of the Exchequer Chamber, were unanimously reversed.⁴

§ 50. It is a plain inference from these cases, that a proposer may withdraw his offer so long as it is not accepted; for if there be no contract till acceptance, there is nothing by which the proposer *can* be bound; and the authorities quite support this inference. Even when on making the offer the proposer expressly promises to allow a certain time¹ to the other party for acceptance,² the offer may nevertheless be retracted in the interval, if no consideration has been given for the promise³ [and provided that the

³ 1 H. & C. 83; 31 L. J. Ex. 448.

⁴ *Proprietors Eng. & For. Cred. Co. v. Arduin*, L. R. 5 H. L. 64.

¹ *Time for acceptance.*—Where an offer allows time for acceptance, while it remains in force and unrevoked, it is a continuing offer, issued on time limited for acceptance; and during the whole of that time, it is an offer every instant, but when accepted it ripens into a contract. *Boston & M. R. R. Co. v. Bartlett*, 57 Mass. (3 Cush.) 224; s. c. 1 Langd. Lead. Cas. on Contr. 94.

² *Acceptance after time.*—It is a general rule that where an offer is made in which the time for its acceptance is limited, an acceptance after the expiration of that will not be binding upon the party making the offer. *Potts v. Whitehead*, 23 N. J. Eq. (8 C. E. Gr.) 512; *Farrell v. Hunt*, 21 Up. Can. C. P. 117. Because an acceptance to be good and to bind the party making the offer must be such as to conclude an agreement by the parties; and to do this, it must, in every respect, meet and

correspond with the offer, neither falling within nor going beyond the terms proposed, but exactly meeting with them at all points and closing with them just as they stand. It is as essential as any other element in such a contract. See *McKibbin v. Brown*, 14 N. J. Eq. (1 McCar.) 13; s. c. 15 N. J. Eq. (2 McCar.) 498; *Longworth v. Mitchell*, 26 Ohio St. 334; *Carr v. Duval*, 39 U. S. (14 Pet.) 77; bk. 10, L. ed. 361; *Eliason v. Henshaw*, 17 U. S. (4 Wheat.) 225; bk. 4, L. ed. 556; *Routledge v. Grant*, 4 Bing. 653; *Kennedy v. Lee*, 3 Meriv. 441; *Honeyman v. Maryatt*, 6 H. L. Cas. 112; *Hutchison v. Bowker*, 5 Mees. & W. 533; *Huddleston v. Briscoe*, 11 Ves. 583.

³ See *Falls v. Gaither*, 9 Port. (Ala.) 605; *Eskridge v. Glover*, 5 Stew. & Port. (Ala.) 264; s. c. 26 Am. Dec. 344; *Burton v. Shotwell*, 13 Bush (Ky.) 271; *Boston & Maine R. R. v. Bartlett*, 57 Mass. (3 Cush.) 224; *Craig v. Harper*, 57 Mass. (3 Cush.) 158; *Abbott v. Shepard*, 48 N. H. 16; *Potts v. Whitehead*, 20

retraction is duly *communicated*⁴ to the other party before he has accepted the offer.⁵]

M. J. Eq. (5 C. E. Gr.) 59; s. c. 23 N. J. Eq. (8 C. E. Gr.) 512; *Hochster v. Baruch*, 5 Daly (N. Y.) 440; *Dix v. Shaver*, 14 Hun (N. Y.) 392; *Faulkner v. Hebard*, 26 Vt. 452; *Dominion Bank v. Knowlton*, 25 Grant. (Ont.) 125; *Chinnock v. Marchioness of Ely*, 6 N. R. 1; s. c. 4 De G., J. & S. 638; *Lucas v. James*, 7 Hare, 410; *Martin v. Mitchell*, 2 J. & W. 428; 1 Sugden, V. & P. (8th Am. ed.) 132; *Leake, Contr.* 20, 21.

Retraction of offer.—An offer of proposal may be withdrawn at any time prior to its acceptance. *Eskridge v. Glover*, 5 Stew. & Port. (Ala.) 264; s. c. 26 Am. Dec. 344. See *Craig v. Harper*, 57 Mass. (3 Cush.) 158; *Abbott v. Shepard*, 48 N. H. 16; *Potts v. Whitehead*, 23 N. J. Eq. (8 C. E. Gr.) 512; *Faulkner v. Hebard*, 26 Vt. 452; *Carr v. Duval*, 39 U. S. (14 Pet.) 77; bk. 10, L. ed. 361; *Smith v. Hudson*, 6 Best & S. 431; s. c. 34 L. J. Q. B. 145; *Routledge v. Grant*, 4 Bing. 653; *Lucas v. James*, 7 Hare, 410; *Martin v. Mitchell*, 2 Jac. & W. 413; *Head v. Diggon*, 3 Man. & R. 97; *Cooke v. Oxley*, 3 T. R. 653; *Payne v. Cave*, 3 T. R. 148. In *Eskridge v. Glover*, *supra*, the defendant agreed to exchange horses with the plaintiff and give him a specified amount as a difference, with the privilege of determining upon the proposition by a certain day, but before that day transpired, gave notice to the plaintiff that he retracted and would not consummate the proposed trade. The plaintiff brought suit to recover the amount he was to receive as “boot money” or a “difference.” The court held that the action could not be maintained. In the course of the opinion it is said “the important but nice distinction is that this contract seems not to have been actually

concluded with only reservation of the right to one to renounce it, but an agreement was that it should become a bargain, if on trial of the horse, the plaintiff should determine to affirm the contract; under these circumstances the law implied the farther condition that the defendant did not in the meanwhile retract his offer, which, however, he did, and thereby avoided the agreement.”

Acceptance before retraction.—Where time is given for acceptance, it must be made within the specified time, and before notice of retraction to constitute a valid contract of sale. *Boston & M. R. R. Co. v. Bartlett*, 57 Mass. (3 Cush.) 224. In this case the court commented and criticised *Cooke v. Oxley*, 3 T. R. 653, cited *supra*. An acceptance after the time limited is not sufficient. *Potts v. Whitehead*, 20 N. J. Eq. (5 C. E. Gr.) 55; *Farrell v. Hunt*, 21 Up. Can. C. P. 117; *Leake on Contr.* 17. *Vide ante*, sec. 50, note 2.

An acceptance must be made by the offeree; an acceptance by any other party will not be binding. *Boulton v. Jones*, 2 Hurls. & N. 564; *Meynell v. Surtees*, 3 Smale & Gif. 101, 117. *Vide infra*, sec. 72, note 1.

⁴ *Retraction must be communicated*, to be binding upon the proposee, and relieve the party making the offer from liability, if the acceptance is duly signified or mailed before any knowledge of such retraction, although one may have really been sent, the acceptance will be binding. *Wheat v. Cross*, 31 Md. 99; s. c. 1 Am. Rep. 28; *Tayloe v. Merchants' F. Ins. Co.*, 50 U. S. (9 How.) 390; bk. 13, L. ed. 187; *The Palo Alto, Daveis* (2 Ware) C. C. 343.

⁵ *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Stevenson v. McLean*, 5 Q. B. D. 346.

Cooke v. Oxley⁶ is the leading case on this point. The declaration was that the defendant had proposed to sell and deliver to the plaintiff 266 hhds. of tobacco on certain terms if the plaintiff would agree to purchase them on the terms aforesaid, *and would give notice thereof to the defendant before the hour of four in the afternoon of that day.* Averment, plaintiff did agree, &c. and did give notice, &c. and requested delivery, and offered payment. Judgment arrested after verdict for the plaintiff. Kenyon C. J. delivering judgment, said: "Nothing can be clearer than that, at the time of entering into this contract, the engagement was all on one side. The other party was not bound. It was, [*45] therefore, *nudum pactum.*" Buller J. said: "It is *impossible to support this declaration in any point of view. In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant; but here was neither when the contract (promise?) was first made. Then as to the subsequent time: the promise can only be supported on the ground of a new contract made at four o'clock; but there is no pretence for that. It has been argued that this must be taken to be a complete sale, from the time when the condition was complied with; but it was not complied with, for it is not stated that the defendant did agree at four o'clock to the terms of the sale; or even that the goods were kept till that time." Grose J. said: "The agreement was not binding *on the plaintiff* before four o'clock; and it is not stated that the parties came to any subsequent agreement; there is, therefore, no consideration for the promise."

This decision was afterwards affirmed in the Exchequer Chamber, M. 32 Geo. III.⁷

§ 51. [The principle of Cooke v. Oxley has been affirmed in the most recent cases, with this limitation, that the retraction of the offer must have been in some way communicated to the other party before his acceptance of it.¹ A

⁶ 3 T. R. 653.

⁷ So stated in note at the end of the Report, in 3 T. R. 653.

¹ Dickenson v. Dodds, 2 Ch. D. 463, C. A.; Byrne v. Van Tienhoven, 5 C. P. D. 344; Stevenson v. McLean, 5 Q. B. D. 346.

tacit retractation is insufficient.² In *Dickenson v. Dodds* notice *aliunde* that the defendant had agreed for the sale of the property in question to a third party was held to be sufficient notice to the plaintiff of the retractation of the defendant's offer, but there is nothing in the judgment to warrant the statement in the head-note; "semble, the sale of property to a third person would of itself amount to a withdrawal of the offer, *even although the person to whom the offer was first made had no knowledge of the sale.*"

It should be observed that *Cooke v. Oxley*, which was a motion in arrest of judgment after verdict for plaintiff, turned solely upon the insufficiency of the plaintiff's allegation. Viewed in the light of subsequent decisions, it is clear that *it would have been sufficient for the [*46] plaintiff to have alleged that at the time when he gave notice of acceptance of defendant's offer, no notice of its withdrawal had been communicated to him.

It is to be observed that in no case has it yet been decided that, when the parties are in immediate communication with one another, a retractation of an offer, to be effectual, must be communicated. Both *Byrne v. Van Tienhoven* and *Stevenson v. McLean* were cases where the parties had contracted by correspondence, but the language there used by the judges to the effect that an uncommunicated revocation is, for all practical purposes and in point of law, no revocation at all, is perfectly general, and it is conceived that the rule would apply equally when the parties are in immediate communication with one another.]

§ 52. In *Routledge v. Grant*,¹ which was the case of an offer by defendant to purchase a house, and to give plain-

² *Per Lush J.* in *Stevenson v. McLean*, 3 Q. B. D. at p. 351; *per Lindley J.* in *Byrne v. Van Tienhoven*, 5 C. P. D. at p. 347.

¹ 4 Bing. 653. See, also, *Humphries v. Carvalho*, 16 East, 45.

American authorities. — *Falls v. Gaither*, 9 Port. (Ala.) 605; *Moltine Scale Co. v. Beed*, 52 Iowa, 307; s. c. 35 Am. Rep. 272; *Belfast, &c. R. R.*

v. Unity, 62 Me. 148; *Boston & M. R. R. v. Bartlett*, 57 Mass. (3 Cush.) 224; *Weiden v. Woodruff*, 38 Mich. 130; *Brown v. Rice*, 29 Mo. 322; *Water Commissioners of Jersey City v. Brown*, 32 N. J. L. (3 Vr.) 504; *Houghwout v. Boisaubin*, 18 N. J. Eq. (3 C. E. Gr.) 315; *Johnson v. Filkington*, 39 Wis. 62.

Giving refusal. — The proposition

tiff six weeks for a definite answer, Best C. J. nonsuited the plaintiff, on proof that defendant had retracted his offer within the six weeks, and on the rule to set aside the nonsuit, said: "If six weeks are given on one side to accept an offer, the other has six weeks to put an end to it; one party cannot be bound without the other." The Chief Justice in this case cited *Cooke v. Oxley* with marked approval.

In *Payne v. Cave*,² it was held that a bidder at an auction may retract his bidding any time before the hammer is down; and *per curiam*, "Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But, according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed."³

to sell may be withdrawn at any time before acceptance, unless it be withdrawn and due notice given. *Larmon v. Jordan*, 56 Ill. 204; *Burton v. Shotwell*, 13 Bush (Ky.) 271; *Longworth v. Mitchell*, 26 Ohio St. 334, 342; *Faulkner v. Hebard*, 26 Vt. 452. And this is true although a refusal has been given for a specified length of time. *Larmon v. Jordan*, 56 Ill. 204; *Boston & M. R. R. Co. v. Bartlett*, 57 Mass. (3 Cush.) 224; *Faulkner v. Hebard*, 26 Vt. 452. And where the contract is not withdrawn, and not accepted within the time limited, it will not be binding, because it is of the essence of such contract. *Longworth v. Mitchell*, 26 Ohio St. 334, 342. *Vide ante*, § 50, note 2. Where the offer is made to several persons jointly, the same rule applies as where made to a single person. *Burton v. Shotwell*, 13 Bush (Ky.) 271.

Retraction by operation of law.—The law in force, when a proposal of a contract is made, it forms part of it; and if such proposal be not accepted until after the law, under which it is made, is essentially modified or repealed, the acceptance comes too late, and the proposal fails, with the repeal or change of the law which

induced it. *Mercer County v. Pittsburgh & E. R. R. Co.*, 27 Pa. St. 389.

Retraction by death.—The death of a party making an offer works a retraction of the same as a death of a master revokes the authority of his agent. *Lee v. Griffin*, 1 Best & S. 272; s. c. 101 Eng. C. L. 270. See *Blades v. Free*, 9 Barn. & Cress. 167; *Campanari v. Woodburn*, 15 C. B. 400; s. c. 80 Eng. C. L. 400. And so the death of the party to whom the offer is made terminates the contract. *Werner v. Humphreys*, 2 Man. & Gr. 853; s. c. 40 Eng. C. L. 659.

² 3 T. R. 148.

³ The ordinary condition of sale which negatives the bidder's right to retract his bidding, and which was suggested to Lord St. Leonards by the decision in *Payne v. Cave*, is in the opinion of conveyancers, not enforceable, unless the sale has taken place under certain special circumstances. See *Sugden, V. & P.* 11 (14th ed.), and *Dart, V. & P.* (ed. 1876) 124.

American authorities.—*Downing v. Brown*, Hard. (Ky.) 181; *Grotenkenper v. Achtermeyer*, 11 Bush (Ky.) 222; *Nat. Bank of Metropolis v. Sprague*, 20 N. J. Eq. (5 C. E. Gr.) 159; *Fisher v. Seltzer*, 23 Pa. St. 308;

§ 53. *In *Head v. Diggon*,¹ the defendant, on [*47] Thursday, the 17th of April, gave the plaintiff a written order in these words: "Offered Mr. Head, of Bury, the under wool, &c. &c. *with three days' grace from the above date.*" These words were put in by the defendant expressly as a promise to wait three days for the plaintiff's acceptance of the offer. The plaintiff went on Monday to accept, but the defendant refused, saying that the three days were out the day before — Sunday. Holroyd J. nonsuited the plaintiff, on the authority of *Cooke v. Oxley*. In the course of the argument for a new trial, Lord Tenterden said: "Must both parties be bound, or is it sufficient if only one is bound? You contend that the buyer was to be free during three days, and that the seller was to be bound." The new trial was refused, his Lordship saying: "If the contract is to be taken as made only at the time when the plaintiff signified his acceptance of the offer, it is disproved by the circumstance that the defendant did not then agree." And Bayley J. concurred on the ground that "unless both parties are bound, neither is."

s. c. 62 Am. Dec. 335. In the case of *Fisher v. Seltzer*, *supra*, the right to withdraw a bid before sale was sustained, though the auctioneer had announced as one of the terms of sale that no bid could be withdrawn.

Acceptance within reasonable time. — Where no time is fixed within which an offer must be accepted, the acceptance must be within a reasonable time, considering the nature of the contract. *Martin v. Black*, 21 Ala. 721; *Averill v. Hedge*, 12 Conn. 424; *Judd v. Day*, 50 Iowa, 247; *Moxley v. Moxley*, 2 Met. (Ky.) 309; *Peru v. Turner*, 1 Fairf. (Me.) 185; *Wilson v. Clements*, 3 Mass. 1; *Craig v. Harper*, 57 Mass. (3 Cush.) 158; *Beckwith v. Cheever*, 21 N. H. 41; *Chicago, &c. R. R. v. Dane*, 43 N. Y. 241; *Johnston v. Fessler*, 7 Watts (Pa.) 43; s. c. 32 Am. Dec. 738; *Minnesota Oil Co. v. Collier Lead Co.*, 4 Dill. C. C. 431; *vide ante*, p. *40, § 47, note 3a.

What is reasonable time. — Where

the parties are in immediate communication, that is, where they meet and negotiate in person, a reasonable time is limited to the interview; and an acceptance, after they have parted, when there is no further understanding, and no giving of time for consideration, such an acceptance is a nullity, because there is no continuing offer. See *Story on Sales*, § 126. Where a contract is made by mail, and from its note or express terms, requires an acceptance by the return mail, the acceptance must be so made or the contract will not be binding. See *Averill v. Hedge*, 12 Conn. 424; *Maclay v. Harvey*, 90 Ill. 525; s. c. 32 Am. Rep. 35; *Batterman v. Morford*, 76 N. Y. 622; *Carr v. Duval*, 39 U. S. (14 Pet.) 77, 82; bk. 10, L. ed. 361.

¹ 3 M. & R. 97; *Burton v. Great Northern Railway Company*, 9 Ex. 507.

[The Great Northern Rail. Co. v. Witham² offers a further illustration of the same principle. The defendant sent in a tender to supply the company with iron in such quantities as they might from time to time order. The company accepted his tender, and *the defendant received and executed several orders*, but ultimately the defendant refused to carry out an order which the company had given. *Held*, that the order given by the company was a sufficient consideration for the defendant's promise. The Court, however, pointed out that their decision did not affect the question of the defendant's right, before any order had been given by the company, to withdraw his offer by giving due notice. 'It is clear that, so far as the agreement was executory, it was unilateral, the company was under no obligation to give any order, and no action would lie against it for not so doing.'³]

[*48] * Another illustration of the same principle is to be found in the case of *Smith v. Hudson*.⁴ There, a quantity of barley had been verbally sold according to

² L. R. 9 C. P. 16; and see *Chicago and Great Eastern Railway Company v. Dana*, 43 N. Y. 240, *post*, p. 70.

³ For this, see *Burton v. Great Northern Railway Company*, 9 Ex. 507.

An agreement to sell lumber. — Where a lumber dealer offers to furnish lumber at stated prices, and receives money on the same, but the contract is never closed by an acceptance of the offer, although a portion of the lumber is delivered, the dealer may treat such lumber as has been delivered as sold at the price named, or he may withdraw his offer on the whole contract, and charge what the lumber sold is reasonably worth, and retain enough of the money advanced for his payment. *Smith v. Weaver*, 90 Ill. 392.

⁴ 6 B. & S. 431; 34 L. J. Q. B. 145. See, also, *Taylor v. Wakefield*, 6 E. & B. 765.

Sale by sample. — As a general rule,

it is well established that where there is neither fraud nor express warranty on an executed contract, for the sale of a chattel, the buyer takes the risk of its quality and condition. No warranty of any kind (unless it be in respect to the title of the seller), can be implied from the fact that a sound price was paid. The maxim is *caveat emptor*, and not *caveat venditor*. *Beirne v. Dord*, 5 N. Y. 95; s. c. 55 Am. Dec. 321; *Siexas v. Wood*, 2 Cal. Cas. (N. Y.) 482; s. c. 2 Am. Dec. 215; *Oneida Manuf. Co. v. Lawrence*, 4 Cow. (N. Y.) 440; *Moses v. Mead*, 1 Den. (N. Y.) 378; s. c. 43 Am. Dec. 676; *Swett v. Colgate*, 20 Johns. (N. Y.) 196; s. c. 11 Am. Dec. 26; *Heermance v. Vernoy*, 6 Johns. (N. Y.) 5; *Davis v. Meeker*, 5 Johns. (N. Y.) 354; *Holden v. Dakin*, 4 Johns. (N. Y.) 421; *Defreeze v. Trumper*, 1 Johns. (N. Y.) 274; s. c. 3 Am. Dec. 329; *Perry v. Aaron*, 1 Johns. (N. Y.) 129; *Snell v. Moses*, 1 Johns. (N. Y.) 96; *Welsh v. Carter*,

sample, and the goods had been actually delivered to the order of the vendee, at the railway station, so as to put an end to the right of stoppage *in transitu*. But the buyer had not yet accepted so as to make the contract valid under the Statute of Frauds, because it was still in his power to exercise the option of accepting or rejecting after examining the quality of the bulk, to see if it corresponded with the sample. The buyer became bankrupt, and the seller at once gave notice to the railway company to hold the barley, subject to his orders; and countermanded the order to convey it to the vendee. The assignees of the buyer insisted on their right to accept the goods in his place, on the ground of the actual delivery to him. But the court held that the withdrawal of the offer by the countermand of the vendor, before final acceptance, prevented the completion of the contract.

§ 54. Where parties living at different places are compelled to treat by correspondence¹ through the post, there is

1 Wend. 185; s. c. 19 Am. Dec. 473; 2 Kent Com. 479, 480. There is however an exception to this rule of the common law, as well established in our law and in the English law as the rule itself, which allows a warranty to be implied on a sale of goods by sample, that the article is in bulk of the same kind and equal in quality with the sample exhibited, in reference to which the parties contracted. *Magee v. Billingsley*, 3 Ala. 696; *Rix v. Dalyhanty*, 8 Port. (Ala.) 140; *Mure v. Donnell*, 12 La. An. 369; *Hall v. Plassan*, 19 La. An. 11; *Coolidge v. Brigham*, 42 Mass. (1 Metc.) 553; *Bradford v. Manly*, 13 Mass. 138; s. c. 7 Am. Dec. 122; *Smithers v. Bircher*, 2 Mo. App. 510; *Guerney v. Atlantic, &c. R. R.*, 58 N. Y. 564; *Pemberton v. Hawkins*, 51 N. Y. 198; s. c. 10 Am. Rep. 591; *Beirne v. Dord*, 5 N. Y. 95, 99; s. c. 55 Am. Dec. 321; *Hargous v. Stone*, 5 N. Y. 87; *Koop v. Handy*, 41 Barb. (N. Y.) 464; *Seixas v. Woods*, 2 Cai. Cas. (N. Y.) 48; s. c. 2 Am. Dec. 215; *Andrews*

v. Kneeland, 6 Cow. (N. Y.) 354; *Moses v. Mead*, 1 Den. (N. Y.) 378; s. c. 43 Am. Dec. 676; *Sands v. Taylor*, 5 Johns. (N. Y.) 395; s. c. 4 Am. Dec. 374.

¹ *Contract by correspondence*. — The prevailing rule is that if a definite proposition is made by letter, and is accepted by letter, within a reasonable time, and before knowledge of any retraction, the contract is closed on the mailing of the acceptance duly addressed and prepaid. *Bryant v. Booze*, 55 Ga. 438; *Levy v. Cohen*, 4 Ga. 1; *Haas v. Myers*, 111 Ill. 421; *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 97; *Ferrier v. Storer*, 63 Iowa, 484; *Moore v. Pierson*, 6 Iowa, 279; s. c. 71 Am. Dec. 409; *Chiles v. Nelson*, 7 Dana (Ky.) 281; *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80; *Stockham v. Stockham*, 32 Md. 196; *Lungstrass v. German Ins. Co.*, 48 Mo. 204; s. c. 8 Am. Rep. 100; *Hallock v. Insurance Co.*, 26 N. J. L. (2 Dutch.) 268; *Bentley v. Columbia Ins. Co.*, 17 N. Y. 421, 424; *Vassar v. Camp*, 11

N. Y. 441; *Myers v. Smith*, 48 Barb. (N. Y.) 614; *Underhill v. North Am. &c.*, 36 Barb. (N. Y.) 354; *Brisban v. Boyd*, 4 Paige Ch. (N. Y.) 17; *Mac-tier v. Frith*, 6 Wend. (N. Y.) 103; s. c. 21 Am. Dec. 252; *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339; *Washburn v. Fletcher*, 42 Wis. 152; *Matteson v. Scofield*, 27 Wis. 671; *Winterport, &c. Co. v. Schooner Jasper*, 1 Holmes C. C. 101; *Tayloe v. Merchants' Ins. Co.*, 50 U. S. (9 How.) 390; bk. 13, L. ed. 187; *In re Imperial Land Co. of Marseilles, Harris's Case*, L. R. 7 Ch. App. 587; s. c. 3 Eng. Rep. 529; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Proprietors, &c. v. Arduin*, L. R. 5 H. L. 64; and this is true although the acceptance may be delayed or may not be received owing to the fault of the post. *Falls v. Gaither*, 9 Port. (Ala.) 614; *Averill v. Hedge*, 12 Comm. 436; *Levy v. Cohen*, 4 Ga. 1; *Hutcheson v. Blake-man*, 3 Met. (Ky.) 80; *Wheat v. Cross*, 31 Md. 99; s. c. 1 Am. Rep. 28; *Abbott v. Shepard*, 48 N. H. 14; *Potts v. Whitehead*, 20 N. J. Eq. (5 C. E. Gr.) 55; *Trevor v. Wood*, 36 N. Y. 307; *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339; *Washburn v. Fletcher*, 42 Wis. 152; *Tayloe v. Merchants' Ins. Co.*, 50 U. S. (9 How.) 390; bk. 13, L. ed. 187; *Adams v. Linsdell*, 1 Barn. & Ald. 681; *Duncan v. Topham*, 8 C. B. 225; *Potter v. Sanders*, 6 Hare, 1; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Stocken v. Collin*, 7 Mees. & W. 515; *Townsend's Case*, L. R. 13 Eq. 148; *Hebb's Case*, L. R. 4 Eq. 9; *In re Imperial Land Co. of Marseilles, Harris' Case*, L. R. 7 Ch. App. 587. The case of *British & Am. Tel. Co. v. Colson*, L. R. 6 Ex. 108, holding a contrary doctrine must be regarded as of no authority. The gist of that decision is thus stated by Kelley C. B.: "It appears to me that if one proposes to another by a letter through the post, to enter into a contract for the sale or purchase of goods, or as in this case, of shares in a company, and the

proposal is accepted by letter, and the letter put into the post, the party having proposed the contract is not bound by the acceptance of it until the letter of acceptance is delivered to him, or otherwise brought to his knowledge, except (in some cases) where the non-receipt of the acceptance has been occasioned by his own act or default." The like doctrine has been held in Massachusetts (*McCulloch v. Eagle Ins. Co.*, 18 Mass. (1 Pick.) 278; but this case is criticised and disapproved by both Story and Parsons), and in Tennessee (*Gillespie v. Edmonston*, 11 Humph. (Tenn.) 553). On this principle the New York Supreme Court has held that the deposit of an acceptance in the letter box of the defendant's place of business completes the contract even though it is never received by him. *Howard v. Daly*, 61 N. Y. 362; s. c. 19 Am. Rep. 285.

What letters must contain.—Where a contract is made by letters, they must embody the contract. *Napier v. French*, 40 N. Y. Super. Ct. (8 J. & S.) 122; *Trevor v. Wood*, 36 N. Y. 307; reversing s. c. 41 Barb. (N. Y.) 255. A letter referring to a previous verbal proposition, stating its terms according to the understanding of the writer, accepting them and requiring the party addressed to acknowledge his acceptance in writing, does not constitute a contract, but a proposition for a contract. *Hough v. Brown*, 19 N. Y. 111. So where a letter is addressed to another, inquiring whether he is the owner of certain real estate, and the price thereof, to which he responds, stating the price at which he holds it, such response will not be construed as a proposition of sale. *Knight v. Cooley*, 34 Iowa, 218.

It is held that letters unexplained fall short of proving what the contract was, and where the first was merely a letter of inquiry which, if unanswered, it was totally irrelevant; and, if answered, the answer would have shown the terms and description

of the property, which are not shown by any of the other letters; and that such evidence does not make a *prima facie* case, so as to justify taking the case from the jury. *Gurney v. Collins* (Mich.) 7 West. Rep. 670.

Continuing offer. — The legal presumption is that the will of the party sending the proposal continues until the letter reaches the party to whom it is directed. *Mactier v. Frith*, 6 Wend. (N. Y.) 103. For this reason an offer by letter is a continuing offer until the letter be received, and for a reasonable time thereafter, during which the party to whom it is addressed may accept the offer and communicate the fact of his acceptance. But the offer may be withdrawn by the maker at any moment, and it is withdrawn as soon as notice of such withdrawal reaches the party to whom the offer is made, and not before; if, therefore, the party accepts the offer before such withdrawal the bargain is completed. There is then a contract founded on mutual assent. And it is held that an acceptance to this effect is made, and is communicated, when the party receiving the offer puts into the mail his answer accepting it. *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Potter v. Sanders*, 6 Hare, 1; *Kennedy v. Lee*, 3 Meriv. 441.

Acceptance by letter. — An acceptance by letter is valid the moment deposited in the post office, properly addressed (*Chiles v. Nelson*, 7 Dana (Ky.) 281; *Vassar v. Camp*, 11 N. Y. 441; *Eliason v. Henshaw*, 17 U. S. (4 Wheat.) 225; bk. 4, L. ed. 556; 1 Pars. on Contr. 406, 408; 2 Id. 94), if no different time for acceptance be specified in the offer. *Falls v. Gaither*, 9 Port. (Ala.) 605; *Averill v. Hedge*, 12 Conn. 424; *Levy v. Cohen*, 4 Ga. 1; *Chiles v. Nelson*, 7 Dana (Ky.) 281; *Thayer v. Middlesex Fire Ins. Co.*, 61 Mass. (10 Pick.) 326; *Beckwith v. Cheever*, 21 N. H. 41; *Brisban v. Boyd*, 4 Paige Ch. (N. Y.) 20; *Mactier v. Frith*, 6 Wend. (N. Y.) 104;

s. c. 21 Am. Dec. 262; *Eliason v. Henshaw*, 17 U. S. (4 Wheat.) 225; bk. 4, L. ed. 556; *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Eyles v. Ellis*, 4 Bing. 112; *Duncan v. Topham*, 8 C. B. 225; *Routledge v. Grant*, 3 Car. & P. 298; s. c. 4 Bing. 653; *Humphries v. Carvalho*, 16 East, 45; *Kufh v. Weston*, 3 Esp. 54; *Head v. Diggon*, 3 Man. & Ry. 97; *Doe & Keeling*, 1 Maule & S. 95; *Potter v. Sanders*, 6 Hare, 1; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Cooke v. Oxley*, 3 T. R. 653; *Robinson v. Thompson*, 2 Ves. 118. And this is held to be true although the acceptance is never received by the party to whom it is addressed. *Washburn v. Fletcher*, 42 Wis. 152. See, also, *Merrill v. Swift*, 18 Conn. 257; s. c. 46 Am. Dec. 315; *Johnson v. Sharp*, 31 Ohio St. 611; s. c. 27 Am. Rep. 529; *Wilt v. Franklin*, 1 Binn. (Pa.) 502; s. c. 2 Am. Dec. 474; *Smith v. Bank of Washington*, 5 Serg. & R. (Pa.) 318; *McKinney v. Rhoads*, 5 Watts (Pa.) 343; *Read v. Robinson*, 6 Watts & S. (Pa.) 329; *Shubar v. Winding*, Cheves (S. C.) L. 218; *Dargin v. Richardson*, Cheves (S. C.) L. 197; *Prime v. Yates*, 2 Tread. (S. C.) 770; *Skipwith v. Cunningham*, 8 Leigh (Va.) 271; s. c. 31 Am. Dec. 742. But simply showing that a letter was written and placed among other letters to be sent to the post office, is not sufficient evidence that it was in fact mailed. *Fellows v. Prentiss*, 3 Den. (N. Y.) 512, 522; s. c. 45 Am. Dec. 484. However, it seems that if the parties reside in the same place, an acceptance by mail is not sufficient. *Britton v. Phillips*, 24 How. (N. Y. Pr.) 111.

When the offer is by letter, or telegram, the acceptance signified in the same manner is sufficient, irrespective of the time when it comes to the knowledge of the proposing party, or whether the answer is ever received. Such acceptance is sufficient subscription to take the case out of the Statute of Frauds. *Trevor v. Wood*, 36 N. Y. 307; reversing s. c. 41 Barb. (N.

Y.) 255; *Minnesota Linseed Oil Co. v. Collier Lead Co.*, 4 Dill. C. C. 431; *Newcomb v. De Roos*, 2 Ell. & E. 271. It is not necessary to prove that the assent actually came to the knowledge of the proposer, nor does evidence that it did not come to his knowledge avail. *Vassar v. Camp*, 11 N. Y. 441, affirming s. c. 14 Barb. (N. Y.) 341; *Parks v. Comstock*, 59 Barb. (N. Y.) 16.

Negligence of servant or other person in mailing letter. — Where a person sent by letter an offer to engage the plaintiff in his millinery shop, asking for a prompt reply, which letter was received by plaintiff on the twenty-second day of the month, which she answered by postal card the next day, accepting the offer, and which, if then mailed, would have reached the defendant on the 24th, but which she gave to a boy to mail, who neglected to mail it until the 25th, it was held that the defendant was not bound by his offer, the plaintiff not having mailed notice of her acceptance in sufficient time, nor was he bound after receiving her answer to notify her that her acceptance had not been signified in time; and his intention afterwards to accept her services and attempt to see her not having been acted on would not change the rule of law. *Maclay v. Harvey*, 90 Ill. 525; s. c. 32 Am. Rep. 35, 40, note. The negligence of a party's agent in mailing her letter, accepting an offer to employ the writer of the letter, is her own negligence, and the writer must bear the consequences of the delay in her agent in mailing the same. *Maclay v. Harvey*, 90 Ill. 525; s. c. 32 Am. Rep. 35, 40, note. And this is true even where the agent is the postmaster. *Thayer v. Middlesex Mutual F. Ins. Co.*, 27 Mass. (10 Pick.) 326; *Bryant v. Booze*, 55 Ga. 438.

Imposing conditions. — But the sender may limit the time for acceptance. *Britton v. Phillips*, 24 How. (N. Y.) Pr. 111; *Lewis v. Browning*, 130 Mass. 173. Thus if the letter containing the offer requests an an-

swer by return mail, and the letter containing the acceptance of the offer is not sent by return mail, the person making it may consider it refused, and may proceed in the same manner as if it had never been made. *Taylor v. Rennie*, 32 Barb. (N. Y.) 272. And the sender may make it a condition that the proposal shall not be binding upon him until notice of its acceptance is received by him. *Vassar v. Camp*, 11 N. Y. 441; *Fellows v. Prentiss*, 3 Den. (N. Y.) 520; s. c. 45 Am. Dec. 484. Or for a limited time only. *Britton v. Phillips*, 24 How. (N. Y.) Pr. 111. And the proposal may be such as to show that an acceptance is not to be made until after examination by the proposer. *Myers v. Smith*, 48 Barb. (N. Y.) 614.

Time of acceptance. — A letter offering a contract does not require the party to whom it is addressed to return an answer by the very next post after its delivery, or lose the benefit of the contract; but an answer posted on the day of receiving the offer is sufficient. *Dunlop v. Higgins*, 1 H. L. Cas. 381. The contract is accepted by the posting of a letter declaring an acceptance of the offer; for when a person has posted a letter declaring his acceptance of a contract offered, he has done all that is necessary for him to do, and is not answerable for casualties occurring at the post-office. *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Stockton v. Collin*, 7 Mees. & W. 515. See also *Falls v. Gaithers*, 9 Port. (Ala.) 615; *Averill v. Hedge*, 12 Conn. 436; *Levy v. Cohen*, 4 Ga. 1; *Chiles v. Nelson*, 7 Dana (Ky.) 281; *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80; *Beckwith v. Cheever*, 21 N. H. 41; *Meyers v. Smith*, 48 Barb. (N. Y.) 614; *Underhill v. North Am. K. G. Co.*, 36 Barb. (N. Y.) 364; *Clark v. Dales*, 20 Barb. (N. Y.) 42; *Vassar v. Camp*, 14 Barb. (N. Y.) 341; s. c. 11 N. Y. 441; *Brisban v. Boyd*, 4 Paige Ch. (N. Y.) 17; *Mactier v. Frith*, 6 Wend. (N. Y.) 103; s. c. 21 Am. Dec. 262; *Hamilton v. Lycoming Mut. Ins.*

Co., 5 Pa. St. 339; *Matteson v. Scofield*, 27 Wis. 671; *In re Imperial Land Co. of Marseilles*; *Harris' Case*, L. R. 7 Ch. App. 587; s. c. 3 Eng. Rep. 529. Where a person makes an offer by post, asking for, or where from the nature of the business he has a right to expect, an answer by return mail, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be by return mail; and if that implied stipulation is not satisfied, the person making the offer is released from it. *Maclay v. Harvey*, 90 Ill. 525; s. c. 32 Am. Rep. 85, 40, note.

Reasonable time. — The answer must be mailed within a reasonable time, unless a time is limited in the offer. The next day will answer. *Dunlop v. Higgins*, 1 H. L. Cas. 381. But four months after will not. *Chicago & C. R. Co. v. Dane*, 43 N. Y. 240. Where the answer is not mailed within a reasonable time (*Taylor v. Rennie*, 35 Barb. (N. Y.) 272; s. c. 22 How. (N. Y.) Pr. 101), in view of all the circumstances, it will be too late and will not bind the other party. *Trevor v. Wood*, 36 N. Y. 307; reversing s. c. 41 Barb. (N. Y.) 255; *Minnesota Linseed Oil Co. v. Collier*, 4 Dill. C. C. 431.

Retractions. — The general principle is that in negotiations and engagements between persons at a distance, when the negotiations are carried on by letters or messengers, an offer by one party, until it is made known to the other, is but an intention not expressed; and if the letter or messenger can be overtaken before it arrives at its destination, it may be revoked or withdrawn before acceptance. *Eskridge v. Glover*, 5 Stew. & Port. (Ala.) 264; s. c. 26 Am. Dec. 344; *Burton v. Shotwell*, 13 Bush (Ky.) 271; *Beckwith v. Cheever*, 21 N. H. 41; *Faulkner v. Hebard*, 26 Vt. 452; *Honeyman v. Marryatt*, 21 Beav. 14; *Hyde v. Wrench*, 3 Beav. 334; *Routledge v.*

Grant, 4 Bing. 653; *Chinnock v. Marchioness of Ely*, 6 N. R. 1. And so an acceptance may be retracted before or simultaneously with its receipt. *Dunmore v. Alexander*, 9 Shaw & Dunl. 190. See, also, *Wheat v. Cross*, 31 Md. 99; s. c. 1 Am. Rep. 28; *Tayloe v. Merchants' Ins. Co.*, 50 U. S. (9 How.) 390; bk. 13, L. ed. 187; *Routledge v. Grant*, 4 Bing. 653; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Byrne v. Tienhoven*, L. R. 5 C. P. Div. 344; s. c. 42 L. T. (N. S.) 371; *Household Fire Co. v. Grant*, 41 L. T. (N. S.) 298; s. c. L. R. 4 Ex. Div. 216; *Brit. & Am. Tel. Co. v. Colson*, 23 L. T. (N. S.) 868; s. c. L. R. 6 Ex. 108. But if the revocation does not arrive until after the offer is received and accepted, it is too late. *McCullough v. Eagle Ins. Co.*, 18 Mass. (1 Pick.) 278; *Mactier v. Frith*, 6 Wend. (N. Y.) 103; s. c. 21 Am. Dec. 262; *The Palo Alto*, 2 Were (Davies) C. C. 343; s. c. 6 N. Y. Leg. Obs. 262, 271; *Adams v. Lindsell*, 1 Barn. & Ald. 621; *Routledge v. Grant*, 4 Bing. 653. Where a proposition of sale is made by letter, the party making the proposition cannot retract after the acceptance by his correspondent has been deposited in the post-office. *Tayloe v. Merchants' Ins. Co.*, 50 U. S. (9 How.) 390; bk. 13, L. ed. 187. Nor can the party accepting retract his acceptance after posting the letter, although prior to his correspondent's receipt of it, nor even if it never be received. *Wheat v. Cross*, 31 Md. 99; s. c. 1 Am. Rep. 28; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. (2 Dutch.) 263; *Vassar v. Camp*, 11 N. Y. 441; *Duncan v. Topham*, 8 C. B. 225; *In re Imperial Land Co. of Marseilles*, *Harris' Case*, L. R. 7 Ch. App. 587; s. c. 3 Eng. Rep. 529.

Acceptance in terms. — An acceptance of an offer by letter must be without qualification. *Trevor v. Wood*, 36 N. Y. 307; *Deshon v. Fosdick*, 1 Wood C. C. 286; *Willing v. Currie*, 36 Up. Can. Q. B. 46; *Bick-*

ford v. Great Western Ry., 28 Up. Can. C. P. 516. And must be in the terms of the proposal and not a variation therefrom. Myers v. Smith, 48 Barb. (N. Y.) 614; Honeyman v. Marryatt, 6 H. L. Cas. 112; affirming s. c. 21 Beav. 14. And in accordance with the terms of the offer, and given within the time prescribed, if any, by the offer. Jenness v. Mt. Hope Iron Co., 53 Me. 20; Tuttle v. Love, 7 Johns. (N. Y.) 470; Bruce v. Pearson, 3 Johns. (N. Y.) 526; Eliason v. Henshaw, 17 U. S. (4 Wheat.) 225; bk. 4, L. ed. 556; Routledge v. Grant, 4 Bing. 653; Andrews v. Garrett, 6 C. B. (N. S.) 262; Wontner v. Shairp, 4 C. B. 404; Thomas v. Blackman, 1 Coll. Ch. 301; Jordan v. Norton, 4 Mees. & W. 155; Holland v. Eyre, 2 Sim. & Stu. 194; see McCollum v. Cushing, 22 Ark. 540; Taylor v. McClung, 2 Houst. (Del.) 24; Baker v. Johnson Co., 37 Iowa, 186; Barns v. Barrow, 61 N. Y. 39; s. c. 19 Am. Rep. 247; White v. Corlies, 46 N. Y. 467; Chicago and Great E. R. Co. v. Dane, 43 N. Y. 240; Baldwin v. Mildeberger, 2 Hall (N. Y.) 176; Coles v. Bowne, 10 Paige Ch. (N. Y.) 526; Suydam v. Clark, 2 Sandf. (N. Y.) 133; Hunt v. Smith, 17 Wend. (N. Y.) 179; s. c. 31 Am. Dec. 296; Taylor v. Wetmore, 10 Ohio, 490; Bleeker v. Hyde, 3 McL. C. C. 279; Russell v. Perkins, 1 Mas. C. C. 368; Cremer v. Higginson, 1 Mas. C. C. 323; First Nat. Bank of Quincy v. Hall, 101 U. S. (11 Otto) 43; bk. 25, L. ed. 322; Utley v. Donaldson, 94 U. S. (4 Otto) 48; bk. 24, L. ed. 57; Adams v. Jones, 37 U. S. (12 Pet.) 207; bk. 9, L. ed. 1058; Grant v. Naylor, 8 U. S. (4 Cr.) 224; bk. 2, L. ed. 603; Appleby v. Johnson, L. R. 9 C. P. 158; Story on Contr. § 1130.

Yet an immaterial addition to an acceptance, which does not in any way vary the proposition, will not render the acceptance void and prevent the taking effect of the contract. Gibbens v. N. E. Met. Asylum District, 11 Beav. 1; Clive v. Beaumont,

1 De G. & Sm. 397; Dickinson v. Dodds, L. R. 2 Ch. Div. 463; Bransom v. Stannard, 41 L. T. (N. S.) 434; Bonnewell v. Jenkins, 38 L. T. (N. S.) 581; Proprietors, &c. v. Arduin, L. R. 5 H. L. 64. Neither will an acceptance with a proposal for variation not made a condition. Matteson v. Scofield, 27 Wis. 671. Where an option is given to the person to whom the proposal is addressed, he may elect which he will accept. Underhill v. North American Kerosene Gaslight Co., 36 Barb. (N. Y.) 354.

Variance. — When the contract is made by letter it cannot be varied, although proof of subsequent waiver of some of its provisions is admissible. Whitmore v. South Boston Iron Co., 84 Mass. (2 Allen) 52; s. c. 1 Am. Law Reg. N. S. 403. A letter written in reply to an offer which restates the terms of the offer, but with some variation, though slight, cannot be regarded as the consummation of a contract, and requires an acceptance upon the terms thus stated, and until unequivocally accepted, is only a mere proposition or offer. Maclay v. Harvey, 90 Ill. 525; s. c. 32 Am. Rep. 35.

Agreement for insurance made by letter. — A written offer by insurers to insure becomes binding on a despatch of an acceptance, provided the acceptance reaches them before being countermanded. In such case, however, the offer must be specific as to the subject, risk, and terms, and the acceptance must reach the insurance within the time prescribed in the offer. McCulloch v. Eagle Ins. Co., 18 Mass. (1 Pick.) 278; 1 Phill. on Ins. 14. Thus where an insurance company made known by letter the terms on which they were willing to insure, the contract was held to be complete when the insured placed a letter in the post-office accepting the terms; and the house having been burned down while the letter of acceptance was in progress by the mail, the company were held responsible.

a modification of the rule to this extent, that the party making the offer cannot retract after the acceptance by his correspondent has been duly posted, although it may not have reached him;² [or may never reach him;³ and the retraction to be effectual must *reach* his correspondent before he has posted his acceptance;⁴] nor can the party accepting retract his acceptance after posting his letter, although prior to his correspondent's receipt of it, nor indeed, if it never be received.⁵

Bentley v. Columbia Ins. Co., 17 N. Y. 423; *The Palo Alto*, 2 Davies (Ware) C. C. 344; *Tayloe v. Merchants' Fire Ins. Co.*, 50 U. S. (9 How.) 390; bk. 13, L. ed. 187. This is true although the letter of acceptance never reaches its destination. *Duncan v. Topham*, 8 C. B. 225.

Contract by telegraph.—The party who sends an order by telegraph makes the telegraph company his agent for its transmission and delivery, and is bound by the message as delivered; and where legal rights of the receiver, found upon such order, are in question, he is entitled to put in evidence the message actually received, as the original. *Saveland v. Green*, 40 Wis. 431. But see 12 Eng. Rep. 242, note. Where an unrevoked offer is accepted by telegraph, it becomes a binding contract the moment the telegram accepting the offer is received. *Schonberg v. Cheney*, 6 N. Y. Sup. Ct. (6 T. & C.) 200; *Balantine v. Watson*, 30 Up. Can. C. P. 529; *Thorne v. Barwick*, 16 Up. Can. C. P. 369; *Harty v. Gooderham*, 31 Up. Can. Q. B. 18; *Prosser v. Henderson*, 20 Up. Can. Q. B. 438. Some courts hold that an acceptance, if sent by telegraph, binds the parties from the time of depositing the acceptance in the telegraph office for transmission. *Trevor v. Wood*, 36 N. Y. 307; reversing s. c. 41 Barb. (N. Y.) 255; *Perry v. Mount Hope Iron Co.*, 15 R. I. 66; *Utley v. Donaldson*, 94 U. S. (4 Otto) 29; bk. 24, L. ed. 54; *Minnesota L. O. Co. v.*

Collier L. Co., 4 Dill. C. C. 431; *Thorne v. Barwick*, 16 Up. Can. C. P. 369; *Marshall v. Jamieson*, 42 Up. Can. Q. B. 115; *Harty v. Gooderham*, 31 Up. Can. Q. B. 18. But it is held in some cases that the rule, that the mailing of a letter of acceptance completes the contract, does not apply to negotiations by telegraph; and that an acceptance sent by telegraph is not completed until delivered to the person to whom it is addressed. See *Trevor v. Wood*, 41 Barb. (N. Y.) 225; s. c. 26 How. (N. Y.) Pr. 451.

² *Adams v. Lindsell*, 1 B. & Ald. 681; *Dunlop v. Higgins*, 1 H. L. C. 381; *Potter v. Saunders*, 6 Hare, 1; *Harris's Case*, 7 Ch. 587. See, also, *Byrne v. Van Tienhoven*, L. R. 5 C. P. Div. 344; *Thompson v. James*, 18 Dunlop, 1; *Stevenson v. McLean*, L. R. 5 Q. B. Div. 346. In *Byrne v. Van Tienhoven* the court say that "it may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is complete the moment the letter accepting the offer is posted."

³ *Household Fire Insurance Company v. Grant*, 4 Ex. D. 216, C. A.

⁴ *Byrne v. Van Tienhoven*, 5 C. P. D. 344; *Stevenson v. McLean*, 5 Q. B. D. 346.

⁵ *Duncan v. Topham*, 8 C. B. 225; *Potter v. Saunders*, 6 Hare, 1; *Household Fire Insurance Company v. Grant*, 4 Ex. D. 216, C. A., per *Baggallay* and *Thesiger* L. JJ., but see *per Bramwell*, L. J., at p. 235; *Dunmore v. Alexander*, 9 Shaw &

In *Adams v. Lindsell*,⁶ the defendants wrote on [*49] the 2d * of September to the plaintiff, offering to sell a quantity of wool on specified terms, "receiving your answer in course of post." The letter was misdirected by the defendants, so that it only reached the plaintiff on the evening of the 7th. An answer was sent on the same evening accepting the offer. This answer was received by defendants on Tuesday, the 9th, in due course. On Monday, the 8th, the defendants not having received the answer, which would have been due on Sunday, the 7th, according to the course of the post, if they had not misdirected their letter making the offer, sold the wool to another person. Action for non-delivery, and verdict for plaintiff. On motion for new trial, it was contended on behalf of the defendants, on the authority of *Payne v. Cave*,⁷ and *Cooke v. Oxley*,⁸ that they had a right to retract their offer until notified of its acceptance; that they could not be bound on their side until the plaintiff was bound on his. But the court said: "If that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer, when accepted by the plaintiff, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer, and assented to it; and so it might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs, and then

Dunlop, 190; and see *post*, page 53. See, also, *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Dunlop v. Higgins*, 1 H. L. Cas. 381.

American authorities.—The leading cases upon this subject in America are: *Bryant v. Booze*, 55 Ga. 438; *Woolbright v. Sneed*, 5 Ga. 167; *Levy v. Cohen*, 4 Ga. 1; *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80; *Stockham v. Stockham*, 32 Md. 196; *Wheat v. Cross*, 31 Md. 99; s. c. 1 Am. Rep. 28; *Finch v. Mansfield*, 97 Mass. 89; *Abbott v. Shepard*, 48 N. H. 14; *Hallock v. Insurance Co.*, 26 N. J. L. (2

Dutch.) 268, 283; *Potts v. Whitehead*, 23 N. J. Eq. (8 C. E. Gr.) 512; *O'Neill v. James*, 43 N. Y. 84; *Mac-tier v. Frith*, 6 Wend. (N. Y.) 104; s. c. 21 Am. Dec. 262; *Tayloe v. Merchants' Ins. Co.*, 50 U. S. (9 How.) 390, bk. 13, L. ed. 187; *The Palo Alto, Davies* (2 Ware), C. C. 344; *Winterport, G. & B. Co. v. Schooner Nickerson*, 1 Holmes C. C. 99. But see *McCulloch v. Eagle Ins. Co.*, 18 Mass. (1 Pick.) 278.

⁶ 1 Barn. & Ald. 681.

⁷ 3 T. R. 148.

⁸ 3 T. R. 653.

the contract is completed by the acceptance of it by the latter."⁹

This case was cited with approval by Lord Cottenham in *Dunlop v. Higgins*¹⁰ as a leading case, his Lordship remarking that "common sense tells us that transactions cannot go on without such a rule." In *Dunlop v. Higgins*, a proposal sent by mail on the 28th of January was received on the 30th, and answered on the same day, but not by the first post of the day, so that it reached the proposer on the 1st of February, instead of the 31st of January. It was held that *the answer was posted in time, and that [*50] the contract was complete by acceptance when the letter of acceptance was posted; the party accepting not being answerable for casualties at the post-office delaying or preventing the arrival of his letter of acceptance.¹¹

§ 55. The Court of Exchequer in *The British and Amer. Tel. Co. v. Colson*,¹ held, however, that where the defendant had applied for shares in the plaintiff's company, and a letter allotting the shares to him had been posted to his address, but not received by him, the contract was not complete, and the learned Barons held, that the cases cited *supra*, in support of the contrary proposition, do not warrant the inference that has been deduced from them.

But this last case has in its turn been criticised by the Lords Justices in the case of *In re The Imperial Land Co. of Marseilles — Harris' Case*,² in which their Lordships intimate their inability to reconcile the decisions of the Barons

⁹ *Construction of contracts by correspondence.* — In the construction of a contract arising out of letters and telegraphic communications, a reasonable interpretation will be given to the contract; the party making a proposal must be considered as renewing his offer every moment until the time at which the answer is to be sent, and then the contract is completed by the acceptance of the offer. *Thorne v. Barwick*, 16 Up. Can. C. P. 369.

¹⁰ 1 H. L. C. 381. See, also, *Potter v. Saunders*, 6 Hare, 1, V. C. Wigram's decision.

¹¹ On this point, see, also, *Duncan v. Topham*, 8 C. B. 225; 18 L. J. C. P. 310. But see the remarks on the accuracy of the report of this case in 8 C. B., by Bramwell B. in *Colson's Case*, L. R. 6 Ex. at p. 120.

¹ L. R. 6 Ex. 108.

² 7 Ch. 587. See, also, *Wells' Case*, 15 Eq. 18.

of the Exchequer with that of the House of Lords in *Dunlop v. Higgins*.³

³ 1 H. L. C. 381. See *Household Fire Insurance Co. v. Grant*, 4 Ex. D. at p. 228.

Goods ordered by letter: when contract completed. (1) *English doctrine.*

— Where a person who carries on business in one town posts a letter there containing an order for goods addressed to a person in another town, if no letter be sent accepting an offer, but instead the goods themselves are sent by a servant or agent and delivered to the party ordering at his place of business, the contract is completed, and a cause of action on it arises in the place where the goods are delivered. *Harris's Case*, L. R. 7 Ch. 587, 593; *Taylor v. Jones*, L. R. 1 C. P. Div. 87. See, also, *Duncan v. Topham*, 8 C. B. 225; *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Evans v. Nicholson*, 32 L. T. 778. In the case of *Taylor v. Jones*, *supra*, Archibald J. says: "Here there was a complete order when the buyer posted the letter ordering the goods, and the acceptance of it was the sending of the goods into the city and there delivering them to the buyer. If the seller had posted in Surrey a letter accepting the offer, the contract would have been made at the place where the offer was accepted; but there being no letter of acceptance, and the goods being delivered in the city where the letter was posted, made the offer and sale completed there." See *Hurdle v. Waring*, L. R. 9 C. P. 435; *Wall's Case*, L. R. 15 Eq. 18; *Evans v. Nicholson*, 32 L. T. 778. See *Jackson v. Spittall*, L. R. 5 C. P. 542; *Vaughan v. Weldon*, L. R. 10 C. P. 47; *Farina v. Home*, 16 Mees. & W. 119; *Meredith v. Meigh*, 2 El. & Bl. 364; s. c. 22 Eng. L. & Eq. 91; *Hunt v. Hecht*, 22 Law J. Rep. (N. S.) Ex. 293; s. c. 20 Eng. L. & Eq. 524.

(2) *American doctrine.* — However,

it is held in this country that when a proposal to purchase goods is made by letter, sent to another state, and is there assented to, the contract of sale is made in the latter state. *Boit v. Maybin*, 52 Ala. 252; *Finch v. Mansfield*, 97 Mass. 89; *McIntyre v. Parks*, 44 Mass. (3 Metc.) 207; *Garbracht v. Commonwealth*, 96 Pa. St. 449; s. c. 42 Am. Rep. 550; *Shriver v. Pittsburg*, 66 Pa. St. 446. And if it is valid by the law of the latter state, it will be enforced in the state whence the letter is sent, although the contract would have been invalid if made there. 1 *Parsons on Contr.* 525. See *Knight v. Mann*, 120 Mass. 219; s. c. 118 Mass. 143; *Frostburg Mining Co. v. New England Glass Co.*, 63 Mass. (9 Cush.) 115; *Rindskopf v. De Ruyter*, 39 Mich. 1; s. c. 33 Am. Rep. 340; *Grimes v. Van Vechten*, 20 Mich. 410; *Stone v. Browning*, 68 N. Y. 598; *Caulkins v. Hellman*, 47 N. Y. 449; s. c. 7 Am. Rep. 461.

(3) *Canadian doctrine.* — In *O'Donohoe v. Wiley*, 43 Up. Can. Q. B. 350, the plaintiff telegraphed to merchants in New York, offering to represent them in bankruptcy proceedings in Toronto, which was accepted by telegraph, and after services rendered, the bill was sent by letter to the defendants in New York, which they, by letter, rejected; it was held that the contract was completed and the cause of action arose in New York. The same doctrine was held by the same court in *McGiveren v. Smith*, 33 Up. Can. Q. B. 203, where the plaintiff, at Kingston, wrote defendant at Montreal, offering certain articles, to which the defendant replied from Montreal. The court held that the contract was made in Montreal, that being the place where the final assent was given. *Vide supra*, sec. 54, note 1.

[In Harris's Case the appellant had applied by letter for shares in the respondent company. After the letter of allotment had been duly posted, but before it had reached him, Harris wrote withdrawing his application. *Held*, on the authority of *Dunlop v. Higgins*, that the contract was complete and irrevocable from the time that the letter of allotment was posted; but it was unnecessary for the decision of the case to consider the correctness of the judgment of the Court of Exchequer in Colson's Case. However, the Court of Appeal has now expressly overruled Colson's Case in *The Household Fire Insurance Co. v. Grant*.⁴ The facts were precisely similar to those in Colson's Case. The defendant had applied for shares in the plaintiff company, and the letter of allotment, duly addressed and posted, never reached him. * It was held by the majority of the Court [*51] (Baggallay and Thesiger L.JJ.) that the defendant was liable as a shareholder.

Bramwell L. J. who dissented, dwelt strongly upon the inconvenience and hardship that must in many instances result to the person making the offer, when, without any default on his part, the letter of acceptance is lost in transmission. Practically, however, this may be avoided by taking the precaution to stipulate, as suggested by Mellish L. J. in Harris's Case, that the contract shall only be complete upon the actual receipt of the letter of acceptance. The rule is restricted to cases where, by reason of general usage, or of the relation between the parties to any particular transaction, or of the terms in which the offer is made, the acceptance of such offer through the post is expressly or impliedly authorized;⁵ but this limitation can hardly be of much practical importance.

For the same principle, as applied to the posting of a letter *containing an offer*, see *Taylor v. Jones*, 1 C. P. D. 87. And as to the property in a letter and its contents, see *Ex parte Cote*, 9 Ch. 27.]

§ 56. In both the above cases of *Adams v. Lindsell* and *Dunlop v. Higgins* it will be observed that the acceptance of

⁴ 4 Ex. D. 216, C. A.

⁵ *Household Fire Insurance Company v. Grant*, 4 Ex. D. at p. 228.

the offer was complete by the posting of the answer *before* the offer was retracted, in accordance with the principle which makes the bargain complete at the moment when *mutual* and *reciprocal* assent has been given. But the language of the Court in *Adams v. Lindsell* is broader than was needed for the decision of that case, for it would extend to an offer sent by mail and retracted by posting a second letter *before the first reached its destination*. This point has not yet been presented directly for decision in our Courts; and it will be considered in connection with the American cases referred to at the end of the chapter.

[Two recent decisions have now covered the point in question.¹ In *Byrne v. Van Tienhoven* (5 C. P. D. 344) [*52] the *defendants, who carried on business at Cardiff, wrote to the plaintiffs at New York offering goods for sale. Their letter was posted on the 1st of October and received by the plaintiffs on the 11th, who accepted the offer by telegram on the same day and also by letter on the 15th. Meanwhile, on the 8th of October, three days previous to the arrival in New York of their letter of the 1st, the defendants wrote a second letter withdrawing their offer. This letter was not received by the plaintiffs until the 20th, several days after they had posted their letter of acceptance. *Held*, that the notice of withdrawal was too late. In considering the question whether a withdrawal of an offer had any effect until it is communicated to the person to whom it has been sent, Lindley J. said: "I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not in fact any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This

¹ *Byrne v. Van Tienhoven*, 5 C. P. D. 344, and *Stevenson v. McLean*, 5 Q. B. D. 346.

is the view taken in the United States. . . . This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier." The learned judge then proceeded to consider the question whether the mere posting of the letter of revocation could be regarded as a communication of it to the plaintiff, and answered it in the negative on the ground that there was no analogy between the two cases of posting a letter of acceptance and one of withdrawal. It is a principle of law that a person who makes an offer by post must be taken to have assented "to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself;" but there is neither principle nor authority to show that the *party accepting has assented to treat the [*53] posting of a letter of withdrawal in the same way.

But an offer is effectually revoked by the *death* of the party making it; nor is it necessary, it would seem, for the fact of death to be notified to the other party.²

§ 57. The second proposition submitted in the text, namely, that a party accepting cannot retract his acceptance after posting his letter, although prior to his correspondent's receipt of it, nor, indeed, if it never be received, has not yet been directly decided.

In *Dunmore v. Alexander*,¹ before the Court of Sessions in Scotland, it was held that there was no contract where the letters of acceptance and revocation arrived together. In the English Courts, however, the principle is now firmly established that the contract is complete and irrevocable

² *Per* Mellish L. J. in *Dickenson v. Dodds*, 2 Ch. D. at p. 475.

Revocation by death or insanity.—The death or insanity of a person making an offer before such offer is accepted, works its revocation. *Pratt v. Trustees of the Baptist Society of Elgin*, 93 Ill. 475; *Browne v. McDonald*, 129 Mass. 66; *Michigan State Bank v. Leavenworth*, 28 Vt. 209; *The Palo Alto, Dav.* (2 Ware) U. S. D. C. 343; *Campanari v. Woodburn*, 15 C. B. 400. But see *Scruggs*

v. Alexander, 72 Mo. 134. Thus a bill of credit (*Michigan Savings Bank v. Leavenworth*, 28 Vt. 209), to pay the expenses of a niece at boarding-school (*Browne v. McDonald*, 129 Mass. 66), a promise to pay for the accomplishment of a particular object (*Campanari v. Woodburn*, 15 C. B. 400), are all terminated by the death of the promisor.

¹ 9 Shaw & Dunlop, 190, referred to *post*, p. 76.

upon the posting of the letter of acceptance. It follows, then, that the acceptor, as well as the proposer, is bound from that time and cannot afterwards escape from his obligation. There are dicta to support this view. Lord Blackburn says, in *Brogden v. Metropolitan Railway Company* (2 App. Cas. at p. 691), that the acceptor by posting his letter has "put it out of his control and done an extraneous act which clenches the matter, and shows beyond all doubt that *each side* is bound." "The moment one man has made an offer," says James L. J. in *Harris's Case* (7 Ch. at p. 591), "and the other has done something binding himself to that offer, then the contract is complete, and *neither party* can afterwards escape from it," and this passage was cited with approval by Thesiger L. J. in the *Household Fire Insurance Company v. Grant* (4 Ex. D. at p. 219). It is true that the argument *ab inconvenienti* has no weight here as in the case of the withdrawal of an offer. The acceptor may notify the revocation by a letter reaching the proposer at the same time as the letter of acceptance, or by means of a telegram the revocation of the acceptance might be the first intimation to the proposer that his offer had been originally

[*54] *accepted, and in neither case would the proposer sustain any loss or inconvenience from the other party's change of intention. This is the view of Bramwell L. J.: "The arrival of the letter of acceptance might," he says, "be anticipated by hand or telegram, and there is no case to show that such anticipation would not prevent the letter from binding."²

Consistently, however, with the view of the finality of the contract, consequent upon the posting of the letter of acceptance, a view adopted in a series of cases closing with the decision of the Court of Appeal in *The Household Fire Insurance Company v. Grant* (from which Bramwell L. J. dissented), there can be little doubt that the proposition now being considered will, when occasion arises, receive judicial sanction.

² See the *Household Fire Insurance Company v. Grant*, 4 Ex. D. 216, C. A. at p. 235. See, also, *per* Cockburn C. J. in *Newcombe v. De Rothschild*, 2 E. & E. 271.

§ 58. Contracts of sale are implied under certain circumstances without any expression of the will or intention of the parties;¹ as where, for example, an express contract has been made, and goods are sent, not in accordance with it, but are nevertheless retained by the purchaser.² In such a case a new contract is implied that the purchaser will pay for them their value: as where the purchaser retained 130 bushels of wheat furnished on a contract to supply 250 bushels;³ and where 152 tons of coal were delivered and retained on an order for 200 or 300 tons.⁴ The rule was fully recognized

¹ *Appropriating goods to use.* — A person who receives goods sent him knowing that the sender claims that the receiver has purchased them of him, cannot, in the absence of mistake or fraud, appropriate them to his own use and then disclaim the purchase. *Wellauer v. Fellows*, 48 Wis. 105; *Beal v. Park F. Ins. Co.*, 16 Wis. 241; *Paine v. Wilcox*, 16 Wis. 202, 217; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

² *Acceptance of proposal: Communication to vendor.* — A proposition may be made in such terms that the doing of the act merely will be a sufficient acceptance of it, without any communication of acceptance to the party making the offer; but in all cases some act must be done or an acceptance made known within the time fixed in the offer. *Curtice v. Blair*, 26 Miss. 325; s. c. 59 Am. Dec. 257; *Potts v. Whitehead*, 20 N. J. Eq. (5 C. E. Gr.) 55; *Longworth v. Mitchell*, 26 Ohio St. 334. Because the time is of the essence of the contract. *Liddell v. Sims*, 14 Miss. (9 Smed. & M.) 612; *Longworth v. Mitchell*, 26 Ohio St. 334; *Bank of Columbia v. Hagner*, 1 Pet. C. C. 455. And where no time is fixed, must be done within a reasonable time. *Martin v. Black*, 21 Ala. 721; *Averill v. Hedge*, 12 Conn. 424; *Peru v. Turner*, 10 Me. 185; *Loring v. Boston*, 48 Mass. (7 Metc.) 409; *Curtis v. Blair*, 26 Miss. 325; s. c. 59 Am. Dec. 257; *Potts v.*

Whitehead, 20 N. J. Eq. (5 C. E. Gr.) 55; *Chicago & G. E. R. R. Co. v. Dane*, 48 N. Y. 240; *Longworth v. Mitchell*, 26 Ohio St. 334; *Minnesota L. Oil Co. v. Collier W. Lead Co.*, 4 Dill. C. C. 431; *Cocker v. Franklin Man. Co.*, 3 Sum. C. C. 530. What is a reasonable time is a question of law for the court. *Craft v. Isham*, 13 Conn. 41; *Averill v. Hedge*, 12 Conn. 424; *Loring v. Boston*, 48 Mass. (4 Metc.) 409.

³ *Oxendale v. Wetherell*, 9 B. & C. 386.

⁴ *Richardson v. Dunn*, 2 Q. B. 222. See, also, *Star Glass Co. v. Morey*, 108 Mass. 570; *Bowker v. Hoyt*, 35 Mass. (18 Pick.) 555; *Wilson v. Wagar*, 26 Mich. 452; *Richardson v. Dunn*, 2 Q. B. 222.

If the vendee of a specified quantity of goods, under an entire contract, receive a part thereof and retains them after the vendor refuses to deliver the residue, this is a severance of the entire contract, and the vendee becomes liable for the price of such part, but he may refuse the vendor's claim by showing that he has sustained damages by the vendor's failure to fulfil his contract. *Bowker v. Hoyt*, 35 Mass. (18 Pick.) 555. See also *Harralson v. Stein*, 50 Ala. 347; *Martin v. Hill*, 42 Ala. 275; *Waldron v. Chase*, 37 Me. 414; s. c. 59 Am. Dec. 56; *Davis v. Moore*, 13 Me. 424; *Morse v. Brackett*, 98 Mass. 205; *Bee Printing Co. v. Hichborn*,

by Parke J. in *Read v. Runn*,⁵ and was well exemplified in the case of *Hart v. Mills* in the Exchequer, in 1846.⁶

86 Mass. (4 Allen) 63; *Snow v. Ware*, 54 Mass. (13 Metc.) 49; *Clark v. Baker*, 46 Mass. (5 Metc.) 452, 461; *Connor v. Henderson*, 15 Mass. 319; *Wilson v. Wagar*, 26 Mich. 452; *Strong v. Saunders*, 15 Mich. 339; *Allen v. McKibbin*, 5 Mich. 449; *Ward v. Fellers*, 3 Mich. 281; *Clark v. Moore*, 3 Mich. 55; *Flanders v. Putney*, 58 N. H. 358; *Gault v. Brown*, 48 N. H. 183, 187; s. c. 2 Am. Rep. 210; *Kelsea v. Haines*, 41 N. H. 246, 253; *Read v. Rann*, 10 Barn. & Cres. 439; *Oxendale v. Wetherell*, 9 Barn. & Cres. 386; *Champion v. Short*, 1 Campb. 53; *Baker v. Sutton*, 1 Campb. 55 note; *Sedgwick on Damages*, 496.

⁵ 10 B. & C. 441; and see *Morgan v. Gath*, 34 L. J. Ex. 165; 3 H. & C. 748.

⁶ *Implied contract of sale* cannot exist where there is an express contract. *Walker v. Brown*, 28 Ill. 378; *Whiting v. Sullivan*, 7 Mass. 109; *Commercial Bank v. Pfeiffer*, 22 Hun (N. Y.) 327; *Wood v. Edwards*, 19 Johns. (N. Y.) 205, 212; *Robertson v. Lynch*, 18 Johns. (N. Y.) 456; *Raymond v. Bearnard*, 12 Johns. (N. Y.) 274; s. c. 7 Am. Dec. 317; *Young v. Preston*, 8 U. S. (4 Cr.) 239; bk. 2, L. ed. 607; *Cutler v. Powell*, 6 T. R. 324; *Toussaint v. Martinnant*, 2 T. R. 104.

Appropriation of goods by purchaser.—When receiving goods sent to him under a claim that he has purchased them, and afterwards disclaims the purchase, such person cannot appropriate them to his own use, and is liable for their value. *Wellauer v. Fellows*, 48 Wis. 105, 109. Should he disclaim the purchase and permit a third person to take and use a portion of them, although he afterwards recovered the residue, and return them to the sender, he will be liable as purchaser. *Bartholamæ v. Paull*, 18 W. Va. 771.

Delivery and acceptance of part.—It is held that if the vendee of a specified quantity of goods, sold under an entire contract, received a part thereof, and retained it after the vendor had refused to deliver the residue, he will be liable for the part received. *Sentell v. Mitchell*, 28 Ga. 196; *Richards v. Shaw*, 67 Ill. 222; *Star Glass Co. v. Morey*, 108 Mass. 570; *Knight v. New Eng. W. Co.*, 56 Mass. (2 Cush.) 271, 289; *Dorr v. Fisher*, 55 Mass. (1 Cush.) 271; *Miner v. Bradley*, 39 Mass. (22 Pick.) 457; *Bowker v. Hoyt*, 35 Mass. (18 Pick.) 555, 557; *Conner v. Henderson*, 15 Mass. 319; s. c. 8 Am. Dec. 103; *Kimball v. Cunningham*, 4 Mass. 502; s. c. 3 Am. Dec. 230; *Shaw v. Badger*, 12 Serg. & R. (Pa.) 275; *Godwin v. Merrill*, 13 Wis. 658; *Oxendale v. Wetherell*, 9 Barn. & Cres. 386; *Champion v. Short*, 1 Campb. 53; *Hunt v. Silk*, 5 East, 449; *Hart v. Mills*, 15 Mees. & W. 85; *Bragg v. Cole*, 6 J. B. Moore, 114; *Richardson v. Dunn*, 2 Q. B. 218. Although such vendee will be entitled to recover such damages as he may have sustained, by reason of the vendor's failure to fulfil his contract. *Ruiz v. Norton*, 4 Cal. 355; s. c. 60 Am. Dec. 618; *Richards v. Shaw*, 67 Ill. 222; *Bowker v. Hoyt*, 35 Mass. (18 Pick.) 555; *Oxendale v. Wetherell*, 9 Barn. & Cres. 386; s. c. 17 Eng. C. L. 401; *Poulton v. Lattimore*, 9 Barn. & Cres. 259; s. c. 17 Eng. C. L. 373. See *Star Glass Co. v. Morey*, 108 Mass. 570; *Morse v. Brackett*, 98 Mass. 205; *Clark v. Baker*, 46 Mass. (5 Metc.) 452, 461; *Conner v. Henderson*, 15 Mass. 319; *Chapman v. Dease*, 34 Mich. 375; *Begole v. McKenzie*, 26 Mich. 470; *Wilson v. Wagar*, 26 Mich. 452; *Kearney v. Doyle*, 22 Mich. 294; *Allen v. McKibbin*, 5 Mich. 449; *Shaw v. Badger*, 12 Serg. & R. (Pa.) 274; *Booth v. Tyson*, 15 Vt. 515;

Goodwin v. Merrill, 13 Wis. 658; *Dermott v. Jones*, 69 U. S. (2 Wall.) 1; bk. 17, L. ed. 763; s. c. 64 U. S. (23 How.) 220; bk. 16, L. ed. 442; *Shipton v. Casson*, 5 Barn. & Cres. 378. See, also, *McMillan v. Malloy*, 10 Neb. 228; s. c. 35 Am. Rep. 471; *Parcell v. McComber*, 11 Neb. 209; *Duncan v. Baker*, 21 Kan. 99; *Steeple v. Newton*, 7 Oreg. 110; s. c. 33 Am. Rep. 705. The limit of recovery in such cases will be the contract price of the true value, at the time and place of delivery and acceptance. *Chapman v. Dease*, 34 Mich. 375; *Carter v. McNeeley*, 1 Ired. (N. C.) L. 448.

New York Doctrine.—But in New York the rule is that on an entire contract of sale there can be no recovery for part delivery. *Kein v. Tupper*, 52 N. Y. 550, 555; *Tompkins v. Dudley*, 25 N. Y. 272; *Bonesteel v. Mayor, &c.*, N. Y., 22 N. Y. 162; *Baker v. Higgins*, 21 N. Y. 397; *Cunningham v. Jones*, 20 N. Y. 486; *Tipton v. Feitner*, 20 N. Y. 423; *Smith v. Brady*, 17 N. Y. 173; *Oakley v. Morton*, 11 N. Y. 25; s. c. 62 Am. Dec. 49; *Norton v. Woodruff*, 2 N. Y. 153; *Pratt v. Gulick*, 13 Barb. (N. Y.) 297; *Lantry v. Parks*, 8 Cow. (N. Y.) 63; *McKnight v. Dunlop*, 4 Barb. (N. Y.) 36; *Paige v. Ott*, 5 Den. (N. Y.) 406; *Read v. Moor*, 19 Johns. (N. Y.) 337; *Ketchum v. Evertson*, 13 Johns. N. Y. 359; s. c. 7 Am. Dec. 384; *Jennings v. Camp*, 13 Johns. (N. Y.) 94; s. c. 7 Am. Dec. 367; *Thorpe v. White*, 13 Johns. (N. Y.) 53; *McMillan v. Vanderlip*, 12 Johns. (N. Y.) 165; s. c. 7 Am. Dec. 299; *Champlin v. Rowley*, 18 Wend. (N. Y.) 187; s. c. 13 Wend. (N. Y.) 258; *Mead v. Degolyer*, 16 Wend. (N. Y.) 632; *Sickles v. Pattison*, 14 Wend. (N. Y.) 257; s. c. 28 Am. Dec. 527; *Stephens v. Beard*, 4 Wend. (N. Y.) 604; *Russell v. Nicoll*, 3 Wend. (N. Y.) 112; s. c. 20 Am. Dec. 670; *Marsh v. Ruleson*, 1 Wend. (N. Y.) 514; *White v. Hewitt*, 1 E. D. Smith (N. Y.) 395.

In *Kein v. Tupper*, 52 N. Y. 550, 555, the court say that "the rule is well established in this state that upon a contract for the delivery of a specified quantity of property, payment to be made on delivery, no action will lie until the whole is delivered. *Baker v. Higgins*, 21 N. Y. 397; *Norton v. Woodruff*, 2 N. Y. 153; *Mead v. Degolyer*, 16 Wend. (N. Y.) 632; *Champlin v. Rowley*, 13 Wend. (N. Y.) 259; *Russell v. Nicoll*, 3 Wend. (N. Y.) 112; s. c. 20 Am. Dec. 670. The English rule, that a recovery may be had for a portion delivered, if retained until after the time for full performance (as held in *Oxendale v. Wetherell*, 9 Barn. & Cres. 387; s. c. 17 Eng. C. L. 401, and other cases), has never been adopted, but expressly repudiated by the courts of this state. That rule rests upon no solid foundation, and in fact an important modification of the New York doctrine, as enunciated in the above cases, is made in the recent case of *Avery v. Willson*, 88 N. Y. 341; s. c. 37 Am. Rep. 503, where it is held that while as a general rule, no action lies on the part of the vendor upon a contract, for the sale, waives the condition precedent of a complete delivery, the vendor may recover for the portion delivered." The same doctrine as that followed in New York was announced in Pennsylvania, as early as the case of *Roberts v. Beatty*, 2 Pen. & W. (Pa.) 63; s. c. 21 Am. Dec. 410.

This same doctrine has been announced in Ohio, in the case of *Witherow v. Witherow*, 16 Ohio, 238, where it was held that a vendor of personal property, to be delivered within a specified period, the payment to be made upon the same or day certain, after the period upon which the delivery was to have been made, failing to deliver the entire property within the time specified, he cannot recover in *indebitatus assumpsit* for any part delivered unless there is a sufficient excuse for the non-delivery of the

In *Hart v. Mills*,⁷ the facts were that the defendant ordered *two* dozen of port and *two* of sherry, to be returned if not approved. Plaintiff delivered next day *four* dozen of each. Defendant not being satisfied with the quality, sent back the whole except one bottle of port and one dozen of sherry, with a note, saying: "I should not have been particular about keeping the four dozen if the quality had suited me.

I return the four dozen of port, minus one bottle, [*55] *which I tasted; also three dozen of sherry, as neither suit my palate." The plaintiff contended that the defendant was liable for two dozen of each kind, on the ground that the order was entire, and that he could not keep part and reject the rest. Alderson B. said: "The defendant orders two dozen and you send four; then he had a right to send back all: he sends back part. What is it but a new contract as to the part he keeps? If you had sent only two dozen of each wine, you would be right; but what right have you to make him select any two dozen from the four?" Held, that the plaintiff could only recover for the thirteen bottles retained on the new contract resulting from his keeping them.

§ 59. It has been held that a plaintiff may recover, as on an implied contract of sale, from a third person who fraudulently induced him to sell goods to an insolvent purchaser, and then obtained the goods for his own benefit from the purchaser.¹

residue. The court say: "This court have always heretofore held that where there is an open specified contract after the performance of labor or the delivery of goods, it must be upon the contract itself." As regards an open and specified contract after the performance of labor, the same doctrine is maintained in Alabama (*Whitley v. Murray* 34 Ala. 155), in Illinois (*Angle v. Hanna*, 22 Ill. 429; s. c. 74 Am. Dec. 161), in Massachusetts (*Olmstead v. Beale*, 36 Mass. (19 Pick.) 528). See *Phelps v. Sheldon*, 30 Mass. (13 Pick.) 50; s. c.

23 Am. Dec. 659; *Willington v. West Boylston*, 21 Mass. (4 Pick.) 103; *Moses v. Stevens*, 19 Mass. (2 Pick.) 335; *Stark v. Parker*, 19 Mass. (2 Pick.) 267; s. c. 13 Am. Dec. 425; *Taft v. Montague*, 14 Mass. 282; s. c. 7 Am. Dec. 215; *Faxon v. Mansfield*, 2 Mass. 147; in Missouri (*Aaron v. Moore*, 34 Mo. 79), and in Vermont (*Kettle v. Harvey*, 21 Vt. 301).

⁷ 15 M. & W. 85.

¹ *Hill v. Perrott*, 3 Taunt. 274; *Abbott v. Borry*, 2 B. & B. 369; *Corking v. Jarrard*, 1 Camp. 37; *Clarke v. Shee*, Cowp. 197.

§ 60. There is also one special case, in which a sale takes place by the operation of certain principles of law, rather than by the mutual assent of the parties, either express or implied. The rule is thus stated in Jenkins, 4th Cent. Ca. 88: "A in trespass against B for taking a horse, recovers damages: by this recovery and execution done thereon, the property in the horse is vested in B."¹ *Cooper v. Shepherd*²

¹ *Implied contract.*—Implied contract to pay for articles furnished or services rendered, will not be raised, where the circumstances indicate a gratuity or gift. Thus where a person is maintained in the family as a member thereof, in the absence of an express contract there can be no recovery for articles, necessities furnished, and services rendered. *Cable v. Ryman*, 26 Ind. 207; *Adams v. Adams*, 23 Ind. 50; *Pitts v. Pitts*, 21 Ind. 309; *House v. House*, 6 Ind. 60; *Oxford v. McFarland*, 3 Ind. 156; *Resor v. Johnson*, 1 Ind. 100; *Williams v. Hutchinson*, 3 N. Y. 312; s. c. 53 Am. Dec. 301; *Carpenter v. Weller*, 15 Hun (N. Y.) 134; *Whaley v. Peak*, 49 Mo. 80; *Allen v. Richmond College*, 41 Mo. 309. Whether there was an agreement to pay is always a question for the jury. *Whaley v. Peak*, 49 Mo. 80; *Hart v. Hart*, 41 Mo. 441; *Guenther v. Birckich*, 22 Mo. 439; *Smith v. Myers*, 19 Mo. 433. However, where goods are sent to a person with the claim that they have been purchased by him, and with full knowledge that they were not a gratuity he accepted and used them, he will be liable for their value. *Wellauer v. Fellows*, 48 Wis. 105, 109. See *Beal v. Park Fire Ins. Co.*, 16 Wis. 241; *Paine v. Wilcox*, 16 Wis. 202, 217; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

Sale by suit.—A judgment in trover, for goods followed by payment, transfers the title to the defendant. See *Hepburn v. Sewell*, 5 Har. & J. (Md.) 211; s. c. 9 Am. Dec. 512; *Lovejoy v. Murray*, 70 U. S. (3 Wall.)

16; bk. 18, L. ed. 134; *Osterhout v. Roberts*, 8 Cow. (N. Y.) 43; *Brady v. Whitney*, 24 Mich. 154; *Fox v. Prickett*, 34 N. J. L. (5 Vr.) 13; *Marsden v. Cornell*, 62 N. Y. 220; *Thayer v. Manley*, 73 N. Y. 309. Some courts go so far as to hold that the title passes upon the mere recovery of a judgment therefor against the wrong-doer without any satisfaction. See *Floyd v. Browne*, 1 Rawle (Pa.) 121; s. c. 18 Am. Dec. 602; *Marsh v. Pier*, 4 Rawle (Pa.) 287; s. c. 26 Am. Dec. 131. But it is not plain how this is so. See *White v. Philbrick*, 5 Me. (5 Greenl.) 145, 152; s. c. 17 Am. Dec. 214.

² 3 C. B. 266. See, also, *Adams v. Boughton*, 2 Str. 1078, more fully reported in *Andrews*, 18; *Holmes v. Wilson*, 10 A. & E. 503; *Barnett v. Brandon*, 6 M. & G. 640, note.

Implied sale: enforcement against fraudulent third persons.—Where one takes the goods of another wrongfully and converts them to his own use, the owner may waive the tort, treat the wrong-doer as a purchaser, and sue in assumpsit as for goods sold and delivered. *Cummings v. Noyes*, 10 Mass. 433, 436; *Evans v. Miller*, 58 Miss. 120; s. c. 38 Am. Rep. 313; *Floyd v. Wiley*, 1 Mo. 430, 643; *Hill v. Davis*, 3 N. H. 384. See *Munsey v. Goodwin*, 3 N. H. 272; *Dalton v. Hamilton*, 1 Hannay (N. B.) 422; *Cooper v. Chitty*, 1 Burr. 31; *Hambly v. Trott*, 1 Cowp. 371, 375; *Johnson v. Spiller*, Doug. 167, note 55; *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Hill v. Perrott*, 3 Taunt. 274; *Birch*

was an action in trover for a bedstead. Plea, a former recovery by plaintiff in trover, of the same bedstead, in an action against C, and that the conversion by C was not later than the conversion charged against the defendant, and that C being possessed of the bedstead, sold it to the defendant, and the taking by the defendant under such sale was the conversion complained of in the declaration. The Court held that this plea averred a *sale* of the bedstead from the plaintiff to C, the vendor of the defendant. On principle,

v. Wright, 1 T. R. 387; 1 Chitty on Contr. 150; 2 Greenlf. Ev. § 118. Some of the goods sold, and a tort, can only be waived at an auction *ex contractu*, maintained where the tortfeasor has converted into money the proceeds of his wrongful act, and thus subjected himself to an action for the money received. An intimation of this sort is thrown out in *O'Conneley v. Natchez*, 1 Smed. & M. (Miss.) 46; s. c. 40 Am. Dec. 87; and in *Mhoon v. Greenfield*, 52 Miss. 440. See *Fuller v. Duren*, 36 Ala. 73; s. c. 76 Am. Dec. 318; *Pike v. Bright*, 29 Ala. 332; *Tucker v. Jewett*, 32 Conn. 563; *Bonnell v. Chamberlin*, 26 Conn. 487; *Barlow v. Stalworth*, 27 Ga. 517; *Johnston v. Salisbury*, 61 Ill. 316; *Creel v. Kirkham*, 47 Ill. 349; *O'Reer v. Strong*, 13 Ill. 688; *Morrison v. Rogers*, 3 Ill. (2 Scam.) 317; *Sanders v. Hamilton*, 3 Dana (Ky.) 550; *Guthrie v. Wickliffe*, 1 A. K. Marsh. (Ky.) 83; *Noyes v. Loring*, 55 Me. 408, 412; *Emerson v. McNamara*, 41 Me. 565; *Berkshire Glass Co. v. Wolcott*, 84 Mass. (2 Allen) 227; s. c. 79 Am. Dec. 787; *Jones v. Hoar*, 22 Mass. (5 Pick.) 285, 290; *Tolan v. Hodgeboom*, 38 Mich. 624; *Watson v. Stever*, 25 Mich. 386; *Smith v. Smith*, 43 N. H. 536; *Mann v. Locke*, 11 N. H. 246, 248; *Bethlehem v. Perseverance Fire Co.*, 81 Pa. St. 445; *Pearsoll v. Chapin*, 44 Pa. St. 9; *Willet v. Willet*, 3 Watts (Pa.) 277; *Stearns v. Dillingham*, 22 Vt. 624; *Elliott v. Jackson*, 3 Wis. 649; *Kelty v. Owens*, 4 Chand. (Wis.) 166; Ben-

nett v. Francis, 2 Bos. & Pul. 550; *Read v. Hutchinson*, 3 Campb. 352; *Best v. Boice*, 22 Up. Can. Q. B. 439. But the more correct doctrine seems to be that the tort may be waived and *assumpsit* maintained when the property taken has been converted either into money or into any other beneficial use, by the wrong-doer, particularly where it has been so applied to his use as to lose its identity. *Evans v. Miller*, 58 Miss. 120; s. c. 38 Am. Rep. 313. See *Johnson v. Reed*, 8 Ark. (3 Eng.) 202; *Halleck v. Mixer*, 16 Cal. 574; *Cooper v. Berry*, 21 Ga. 526; *Moses v. Arnold*, 48 Iowa, 187; s. c. 22 Am. Rep. 239; *Webster v. Drinkwater*, 5 Me. (5 Greenl.) 323; *Stockett v. Watkins*, 2 Gill. & J. (Md.) 326; s. c. 20 Am. Dec. 438; *Ladd v. Rogers*, 93 Mass. (11 Allen) 209; *Boston & W. R. R. Corp. v. Dana*, 67 Mass. (1 Gray) 83; *Appleton v. Bancroft*, 51 Mass. (10 Metc.) 231; *Miller v. Miller*, 24 Mass. (7 Pick.) 133; *Jones v. Hoar*, 22 Mass. (5 Pick.) 285; *Cravath v. Plympton*, 13 Mass. 454; *Watson v. Stever*, 25 Mich. 386; *Fiquet v. Allison*, 12 Mich. 328; *Welch v. Baggs*, 12 Mich. 42; *Labeaume v. Hill*, 1 Mo. 42; *Floyd v. Wiley*, 1 Mo. 430, 643; *Hill v. Davis*, 3 N. H. 384; *Chauncy v. Yeaton*, 1 N. H. 151; *Randolph Iron Co. v. Elljott*, 34 N. J. L. (5 Vr.) 184; *Budd v. Hiler*, 27 N. J. L. (3 Dutch.) 43; *Barker v. Cory*, 15 Ohio, 9; *Dundas v. Muhlenberg's Executors*, 35 Pa. St. 351; *Gray v. Griffith*, 10 Watts (Pa.) 431; *Ford v. Cald-*

however, it is plain that the recovery in trover would only have this effect *in cases where the value of [*56] the thing converted is included in the damages recovered.³

But an *unsatisfied* judgment in trover does not pass the property, and is a mere assessment of damages on *payment* of which the property vests in the defendant.⁴

§ 61. From the general principle that contracts can only be effected by mutual assent, it follows that where, through some mistake of fact,¹ each was assenting to a different con-

well, 3 Hill (S. C.) 248; Putnam v. Wise, 1 Hill (N. Y.) 240; s. c. 37 Am. Dec. 309; Schweizer v. Weiber, 6 Rich. (S. C.) 159; Janes v. Buzzard, 1 Hempst. C. C. 240.

³ See reasoning of the court, in Chinnery v. Viall, 5 Hurl. & N. 288; 29 L. J. Ex. 180.

⁴ Brinsmead v. Harrison, L. R. 6 C. P. 584, affirmed in Cam. Scac. L. R. 7 C. P. 547; Ex parte Drake, 5 Ch. D. 866, C. A.

American authorities. — Sharp v. Gray, 5 B. Mon. (Ky.) 4; Carlisle v. Burley, 3 Me. (3 Greenl.) 250, 255; Hepburn v. Sewell, 5 Har. & J. (Md.) 211; s. c. 9 Am. Dec. 512; Rotch v. Hawes, 29 Mass. (12 Pick.) 138; s. c. 22 Am. Dec. 414; Brady v. Whitney, 24 Mich. 154; Hyde v. Noble, 13 N. H. 494, 502; s. c. 38 Am. Dec. 508; Thayer v. Manley, 73 N. Y. 305, 309; Marsden v. Cornell, 62 N. Y. 215, 220; Ball v. Liney, 48 N. Y. 6, 16; s. c. 8 Am. Rep. 511; Osterhout v. Roberts, 8 Cow. (N. Y.) 43; Jones v. McNeil, 2 Bail. (S. C.) 466; Sanderson v. Caldwell, 2 Aik. (Vt.) 203; Lovejoy v. Murray, 70 U. S. (3 Wall.) 1, 16; bk. 18, L. ed. 129, 134; 2 Kent Com. 388.

Judgment in trover. — If execution be issued thereon, though without satisfaction, it is a bar to an action of trespass, afterwards brought by the same plaintiff against another person. White v. Philbrick, 5 Me. (5 Greenl.) 147; s. c. 17 Am. Dec. 214; Floyd v.

Browne, 1 Rawle (Pa.) 121; s. c. 18 Am. Dec. 602; Fox v. Northern Liberties, 3 Watts & S. (Pa.) 107. In Pennsylvania the judgment, without payment, transfers title. Floyd v. Browne, 1 Rawle (Pa.) 121; s. c. 18 Am. Dec. 602; Marsh v. Pier, 4 Rawle (Pa.) 286; s. c. 26 Am. Dec. 131; Fox v. Northern Liberties, 3 Watts & S. (Pa.) 103, 107. In the case of Fox v. Northern Liberties, *supra*, the court say: "The authority in this state, so far as we have any evidence of it, seems to be in favor of the principle that the judgment alone in such case transfers the property." See White v. Philbrick, 5 Me. (5 Greenl.) 147; s. c. 17 Am. Dec. 214; Merrick's Estate, 5 Watts & S. (Pa.) 9.

¹ A *material mistake* as to the existence, identity, species, or kind of the subject-matter, or as to the price to be paid, will vitiate a contract, where it is the foundation thereof. See Rovegno v. Defferari, 40 Cal. 459; Hartford, &c. R. R. v. Jackson, 24 Conn. 514; s. c. 63 Am. Dec. 177; Harvey v. Harris, 112 Mass. 32; Hills v. Snell, 104 Mass. 173; s. c. 6 Am. Rep. 216; Kyle v. Kavanagh, 103 Mass. 356; s. c. 4 Am. Rep. 560; Winchester v. Howard, 97 Mass. 304; Gardner v. Lane, 91 Mass. (9 Allen) 492; Mudge v. Oliver, 83 Mass. (1 Allen) 74; Gibson v. Pelkie, 37 Mich. 380; McGoren v. Avery, 37 Mich. 120; Webb v. Odell,

49 N. Y. 583; *Calkins v. Griswold*, 11 Hun (N. Y.) 208; *Byers v. Chapin*, 28 Ohio St. 300; *Barker v. Dinsmore*, 72 Pa. St. 427; s. c. 13 Am. Rep. 697; *Decan v. Shipper*, 35 Pa. St. 239; s. c. 78 Am. Dec. 334; *Ketchum v. Catlin*, 21 Vt. 191; *Utey v. Donaldson*, 94 U. S. (4 Otto) 29; bk. 24, L. ed. 54; *Allen v. Hammond*, 38 U. S. (11 Pet.) 63; bk. 9, L. ed. 633; *Greene v. Bateman*, 2 Woodb. & M. C. C. 359.

It has been said that "the cases founded on mistake seem to rest on this principle — that if parties believing that a certain state of things exist, come to an agreement with such belief for its basis, on discovering their mutual error they are remitted to their original rights." *Barfield v. Prince*, 40 Cal. 535, 542; *Hills v. Snell*, 104 Mass. 173; s. c. 6 Am. Rep. 216; *Cutts v. Guild*, 57 N. Y. 229; *Ketchum v. Stevens*, 19 N. Y. 499; *Fullerton v. Dalton*, 58 Barb. (N. Y.) 236; *Mowatt v. Wright*, 1 Wend. (N. Y.) 355, 362; s. c. 19 Am. Dec. 508; *Baker v. Lyman*, 38 Up. Can. Q. B. 498.

Where valuables are secreted in an article sold, of which fact both vendor and purchaser are ignorant, no title will pass to the secreted articles. See *Ray v. Light*, 34 Ark. 421; *Bowen v. Sullivan*, 62 Ind. 281; s. c. 30 Am. Rep. 172; *Huthmacher v. Harris*, 38 Pa. St. 491; s. c. 80 Am. Dec. 502. And where a person at a public sale bids upon one parcel or lot of goods, supposing it to be another, there will be no sale of either lot. *Sheldon v. Capron*, 3 R. I. 171.

Mistake as to price. — Where there is a mutual mistake in regard to the price of the article, there will be no sale, and neither is bound. Thus, where a vendor gave the price of goods as \$165 and the purchaser understood the price to be \$65, it was held that there was no sale. *Rupley v. Daggett*, 74 Ill. 351. See *Greene v. Bateman*, 2 Woodb. & M. C. C. 359. See § 63, foot-note 2.

Mistake as to quality, quantity, or fitness of articles purchased for some

intended but unexpressed purpose, will not have the effect to avoid the sale. Ordinarily, mistakes on the part of the purchaser relative to the qualities of the property, caused by the communication of the seller, did not call for interposition of the court of equity. Relief will be granted only when the mistake as to a fact, that it is of such a nature that the party could not by reasonable diligence get knowledge of it when put upon inquiry. *Taylor v. Fleet*, 4 Barb. (N. Y.) 95. Where the mistake as to a fact wholly collateral and not affecting the essence of the contract, there can be no relief. *Wheat v. Cross*, 31 Md. 99; s. c. 1 Am. Rep. 28. Particularly is this so where the purchase is made for some unintended and undisclosed purpose.

Mistake as to identity of party. — Where A. sells goods to B., who sells them to C., the fact that A. supposed he was selling the goods to C. through B. as his agent, and would under no circumstances have sold them to B. on his sole credit, A. cannot maintain an action again against C. for the conversion of the goods. *Stoddard v. Ham*, 129 Mass. 383; s. c. 37 Am. Rep. 369; distinguishing *Boston Ice Co. v. Potter*, 123 Mass. 28; s. c. 25 Am. Rep. 9; *Hardman v. Booth*, 1 Hurls. & Colt. 803. If A., in such purchase, had fraudulently represented himself as B., a reputable merchant of a neighboring town, the title to the goods would have passed to him, on delivery to a common carrier. *Edmunds v. Merchants' Des. Trans. Co.*, 135 Mass. 283. See *Western Union Tel. Co. v. Meyer*, 61 Ala. 158; s. c. 32 Am. Rep. 1; *Samuel v. Cheney*, 135 Mass. 278; s. c. 46 Am. Rep. 467; *Dunbar v. Boston & P. R. R. Co.*, 110 Mass. 26; s. c. 14 Am. Rep. 576; *Cundy v. Lindsay*, L. R. 3 Ap. Cas. 459; *Clough v. London & N. W. R. R. Co.*, L. R. 7 Ex. 26; *McKean v. McIvor*, L. R. 6 Ex. 36; *Heugh v. London & N. W. R. R. Co.*, L. R. 5 Ex. 51. But see *Southern Express Co. v. Van Meter*, 17 Fla. 783; s. c.

35 Am. Rep. 107; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; s. c. 6 Am. Rep. 140; *Houston, &c. R. Co. v. Adams*, 49 Tex. 748; s. c. 30 Am. Rep. 116. But if A. represented himself to be the brother of B., and, buying for him, buys goods in person of another, the title to such goods does not pass to him. *Rodliff v. Dallinger*, 141 Mass. 1; *Edmunds v. Merchants' Des. & Trans. Co.*, 135 Mass. 283; *Randolph Iron Co. v. Elliott*, 34 N. J. L. (5 Vr.) 184; *Hamet v. Letcher*, 37 Ohio St. 356; s. c. 41 Am. Rep. 519; *Dean v. Yates*, 22 Ohio St. 388; *Barker v. Dinsmore*, 72 Pa. St. 427; s. c. 13 Am. Rep. 697; *McCrillis v. Allen*, 57 Vt. 505; *Fields v. Stearns*, 42 Vt. 106; *Poor v. Woodburn*, 25 Vt. 234; *Fitzsimmons v. Joslin*, 21 Vt. 129. See *Fawcett v. Osborn*, 32 Ill. 411; *Moody v. Blake*, 117 Mass. 23; s. c. 19 Am. Rep. 394; *Saltus v. Everett*, 20 Wend. (N. Y.) 267; s. c. 22 Am. Dec. 541; *Barker v. Dinsmore*, 72 Pa. St. 427; s. c. 13 Am. Rep. 697; *Lickbarrow v. Mason*, 1 Smith's L. C. 2d pt. 1195; *Fowler v. Hollins*, L. R. 7 Q. B. 616; affirmed, L. R. 7 H. L. 757; *In re Reed*, 3 Chan. Div. 123; *Hardman v. Booth*, 1 Hurls. & C. 803; *Kingsford v. Merry*, 1 Hurls. & N. 503; *Higgon v. Burton*, 26 L. J. Ex. 342. And the same is true where A. fraudulently represented that he was acting for a responsible but undisclosed principal. *Rodliff v. Dallinger*, 141 Mass. 1; *Edmunds v. Merchants' Des. & Trans. Co.*, 135 Mass. 283.

Mistake as to subject-matter. — A contract made while the parties thereto are under a mutual mistake as to, or in ignorance of, the material facts affecting the subject-matter is invalid (*Ketchum v. Catlin*, 21 Vt. 191, 194. See *Cutts v. Guild*, 57 N. Y. 229; *Booth v. Bierce*, 38 N. Y. 463; *Baldwin v. Middleberger*, 2 Hall (N. Y.) 176; *Fullerton v. Dalton*, 58 Barb. (N. Y.) 236; *Dana v. Monroe*, 38 Barb. (N. Y.) 528; *Scranton v. Booth*, 29 Barb. (N. Y.) 171; *Saltus v. Pruyn*, 18 How. (N. Y.) Pr. 512;

Wheadon v. Olds, 20 Wend. (N. Y.) 174; *Mowatt v. Wright*, 1 Wend. (N. Y.) 362; s. c. 19 Am. Dec. 508; *Sheldon v. Capron*, 3 R. I. 171; *Flight v. Booth*, 1 Bing. N. C. 370; s. c. 27 Eng. C. L. 421; *Cox v. Prentice*, 3 Maule & S. 344), and may be avoided either in a court of law or equity. *Ketchum v. Catlin*, 21 Vt. 191, 194. See, also, *Sherwood v. Walker* (Mich.) 36 Alb. L. J. 243; s. c. 10 West. Rep. 636. See 2 Chicago L. T. 18; *Mowatt v. Wright*, 1 Wend. 355, 356; s. c. 19 Am. Dec. 508. Such as a mistake in the quantity of grain in a bin (*Wheadon v. Olds*, 20 Wend. (N. Y.) 174), or the number of acres in a tract of land (*Williams v. Hathaway*, 36 Mass. (19 Pick.) 387; *Smith v. Ware*, 13 Johns. (N. Y.) 257). But where this ignorance or mistake is as to law, and there is no mistake as to facts, there will be no relief. *Chapman v. City of Brooklyn*, 40 N. Y. 380; *Rheel v. Hicks*, 25 N. Y. 291; *Lott v. Swezey*, 29 Barb. (N. Y.) 87; *Wyman v. Farnsworth*, 3 Barb. (N. Y.) 369; *Hargous v. Ablon*, 3 Den. (N. Y.) 408; s. c. 45 Am. Dec. 481; *Boyer v. Pack*, 2 Den. (N. Y.) 107; *Supervisors of Onondago v. Briggs*, 2 Den. (N. Y.) 40; *Granger v. Olcott*, 1 Lans. (N. Y.) 169; *Goddard v. Merchants' Bank*, 2 Sandf. (N. Y.) 253; *Wheadon v. Olds*, 20 Wend. (N. Y.) 176; *Mowatt v. Wright*, 1 Wend. (N. Y.) 355, 362; s. c. 19 Am. Dec. 508. Thus in *Chapman v. Cole*, 66 Mass. (12 Gray) 141; s. c. 71 Am. Dec. 739, where A., intending to pay B. fifty cents, gave him by mistake a gold coin of the value of ten dollars, supposing that it was half a dollar, and B., by like mistake, paid it to C., the defendant, the court held that the mistake of fact prevented it from being a binding transaction, and that A., having tendered fifty cents to C., the defendant, could recover from him. And it is on this ground of mistake, that the sale of a piece of furniture with a concealed drawer containing valuables does not pass title to the arti-

cles in such drawer. *Ray v. Light*, 34 Ark. 421; *Bowen v. Sullivan*, 62 Ind. 281; *Livermore v. White*, 74 Me. 452; s. c. 43 Am. Rep. 600; *Huthmacher v. Harris*, 38 Pa. St. 491; s. c. 80 Am. Dec. 502; *Durfee v. Jones*, 11 R. I. 588; s. c. 23 Am. Rep. 528.

Michigan doctrine.—In the recent case of *Sherwood v. Walker* (Mich.) 36 Alb. L. J. 243; s. c. 10 West. Rep. 636; 2 Chicago L. T. 18, the Supreme Court of Michigan passed upon the question of mistake of fact in the sale of chattels. This case grew out of the bargain and sale of a blooded cow which was supposed by the owner to be barren, and the purchaser affected to believe so also. If barren, as supposed, the cow was useless for all purposes except beef, and was worth for that purpose no more than other beef cattle; but if she was not barren, she was worth from \$750 to \$1000. On the supposition that she was barren the cow was bargained at five and one-half cents per pound, for beef, at which price she was worth about \$80. Before the cow was delivered to the purchaser she was found to be with calf, and to be valuable as a breeder, and the seller undertook to rescind the contract of sale by refusing to deliver the cow to the purchaser. The question raised was whether the owner and vendor could rescind the contract of sale, and it was held that he could. The court said: "It appears from the record that both parties supposed this cow was barren and would not breed, and she was sold by the pound for an insignificant sum as compared with her real value if a breeder. She was evidently sold and purchased on the relation of her value for beef, unless the plaintiff had learned of her true condition, and concealed such knowledge from the defendants. Before the plaintiff secured the possession of the animal the defendants learned that she was with calf, and therefore of great value, and undertook to rescind the sale by refusing to deliver her. The question arises whether they

had a right to do so. The circuit judge ruled that this fact did not avoid the sale, and it made no difference whether she was barren or not. I am of the opinion that the court erred in this holding. I know that this is a close question, and the dividing line between the adjudicated cases is not easily discerned. But it must be considered as well settled that a party who has given an apparent consent to a contract of sale may refuse to execute it, or he may avoid it after it has been completed, if the assent was founded, or the contract made, upon the mistake of a material fact, such as the subject-matter of the sale, the price, or some collateral fact materially inducing the agreement. And this can be done when the mistake is mutual." See, to the same effect, *Harvey v. Harris*, 112 Mass. 32; *Gardner v. Lane*, 91 Mass. (9 Allen) 492; s. c. 94 Mass. (12 Allen) 44; *Gibson v. Pelkie*, 37 Mich. 380; *Cutts v. Guild*, 57 N. Y. 229; *Byers v. Chapin*, 28 Ohio St. 300; *Huthmacher v. Harris*, 33 Pa. St. 491; s. c. 80 Am. Dec. 502; *Allen v. Hammond*, 38 U. S. (11 Pet.) 63, 71; bk. 9, L. ed. 636. *Leake on Contr.* 339; *Story on Sales* (4th ed.) §§ 148, 377.

Wisconsin doctrine. "*The diamond case.*"—It would seem that a different doctrine prevails in Wisconsin. In the case of *Wood v. Boynton*, 64 Wis. 265; s. c. 54 Am. Rep. 610; 36 Alb. L. J. 243; 25 N. W. Rep. 42, a poor woman sold a stone which she had been informed was topaz, and which she believed to be topaz, to jewellers in Milwaukee for the sum of one dollar. The stone was about the size of a canary bird's egg, nearly the shape of an egg—worn pointed at one end—and was "straw color" or a little darker. When examined by a skilful lapidary it was ascertained that the stone was not topaz, as supposed, but an uncut diamond, and worth from \$700 to \$1000. On learning that the stone was a diamond, and not a topaz, as she had

tract, there is no real valid agreement, notwithstanding the apparent mutual assent.²

supposed, Mrs. Wood tendered back to the jewellers the one dollar she had received for the stone, together with ten cents as interest, and demanded a return of the stone. The jewellers rejected the tender and refused to deliver the stone. In an action brought by Mrs. Wood to recover the possession of the stone it was held that the stone being open to the inspection of both parties, both being ignorant of its real nature and true value, and supposing the sum offered and received to be a fair price, and there being no showing of actual fraud on the part of the jewellers in procuring the sale made to them, that the sale could not be rescinded. The court says: "The only question in the case is whether there was anything in the sale which entitled the vendor (the appellant) to rescind the sale and so revest the title in her. The only reasons we know of for rescinding a sale and revesting the title in the vendor so that he may maintain an action at law for the recovery of the possession as against his vendee are (1) that the vendee was guilty of some fraud in procuring a sale to be made to him; (2) that there was a mistake made by the vendor in delivering an article sold — a mistake, in fact, as to the identity of the thing sold with the thing delivered upon the sale." The Supreme Court of Michigan, however, have since discovered or found a third reason, and that is, the vendor's misapprehension as to the substance of the thing bargained and sold. They say: "If there is a difference or misapprehension as to the substance of the thing bargained for — if the thing actually delivered or received is different in substance from the thing bargained for and intended to be sold, then there is no contract; but if it is only

a difference in some quality or accident, even though the mistake may have been the actuating motive to the purchaser or seller or both of them, yet the contract remains binding. The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole contract, going, as it were, to the root of the matter, or only to some point, even though at a material point, an error as to which does not affect the substance of the whole consideration." *Sherwood v. Walker* (Mich.), 36 Alb. L. J. 243; s. c. 10 West. Rep. 636, 640. See *Kennedy v. Panama, N. Z. & A. R. M. Co.*, L. R., 2 Q. B. 579, 587.

Irving Browne has well said (see 54 Am. Rep. 614, note) that the case of *Wood v. Boynton* is nearly if not quite unique; and it certainly stands alone in the doctrine that a person who sells property under a mistake of fact, or misapprehension as to the substance of the thing bargained and sold, may not rescind the contract and recover his property. In that case a woman bargained and sold a stone supposed to be topaz, for topaz: and inasmuch as the stone was not topaz, but a diamond, the ignorance of the parties as to the true nature of the stone puts the case on all fours with that of *Sherwood v. Walker*, *supra*. It is evident that there was no sale, and that the delivery of the stone did not carry title. See *Sherman v. Barnard*, 19 Barb. (N. Y.) 291; *Silvernail v. Cole*, 12 Barb. (N. Y.) 685; *Suydam v. Clark*, 2 Sandf. (N. Y.) 133; *Hazard v. New England Ins. Co.*, 1 Sumn. C. C. 218; *Allen v. Hammond*, 36 U. S. (11 Pet.) 61, 73; bk. 9, L. ed. 636; *Gove v. Wooster*, Lalor's Sup. 30; *Couturier v. Hastie*, 5 H. L. 673; *Metcalf on Contr.* 30; 1 Poth. Ob. by Evans, 113; 2 Kent Com. 468.

² *Mistake as to identity.*—Where there is a mistake respecting the identity of the subject-matter of the contract, as where the article bargained contains goods not intended to be sold and not known to be (Ray v. Light, 34 Ark. 421; Bowen v. Sullivan, 62 Ind. 281; s. c. 30 Am. Rep. 172; Huthmacher v. Harris, 38 Pa. St. 491; s. c. 80 Am. Dec. 502), there will be no sale. And where in a negotiation for a sale the vendor refers to one article and the purchaser to another, their minds do not meet and the property does not pass. Kyle v. Kavanagh, 103 Mass. 356; s. c. 4 Am. Rep. 560; Spurr v. Benedict, 99 Mass. 463; Gardner v. Lane, 91 Mass. (12 Allen) 39, 44; s. c. 91 Mass. (9 Allen) 492, 499; Chapman v. Cole, 78 Mass. (12 Gray) 141; s. c. 71 Am. Dec. 739; Rice v. Dwight Manuf. Co., 56 Mass. (2 Cush.) 80, 86; Webb v. Odell, 49 N. Y. 583; Sheldon v. Capron, 3 R. I. 171; Calverley v. Williams, 1 Ves. Jr. 210. Thus where cotton was sold by sample, which was supposed to be long stapled cotton, but when delivered proved to be short stapled cotton, it was held that the cotton was different in kind from that which the purchaser had contracted to buy, and that he was entitled to reject it. Azemar v. Casella, L. R. 2 C. P. 677; where damaged flour was offered at auction, divided into two classes, one class, slightly damaged, offered in the barrels in which it is ordinarily packed, and the much damaged flour offered by the pound as repacked flour or dough, and these classes of flour were arranged in rows outside of the office, where the arrangement was made, and the plaintiff purchased some of the barrels which had been misplaced from the first row to the second, the person selling being ignorant of the displacement, and supposing it to be a different quality of goods, it was held that there was no sale, because their minds did not meet as to the subject-matter of the

sale. Harvey v. Harris, 112 Mass. 32. In Gardner v. Lane, 91 Mass. (9 Allen) 492, a number of barrels of No. 1 mackerel were sold, and by mistake some barrels of No. 3 mackerel and some barrels of salt were delivered; it was held that no title passed to the purchaser. Although the articles delivered were not of the same description nor of as great value as those purchased, yet the purchaser was willing to keep the goods delivered as and for the property for which the bargain was made; but the court held that there was no sale, that the title did not pass, and the parties claiming it as the property of the vendor might intervene and take it from the purchaser. When this case was before the court again in 94 Mass. (12 Allen) 39, the court said, "it cannot be doubted that if under a contract of sale a delivery was made through mistake of an article different from that agreed upon by the parties, there would be no sale of the article delivered, and no property in it would pass, for the simple reason that the vendor had not agreed to sell, nor the vendee to buy it. There would in fact be no contract by the parties in respect to the articles actually furnished. To express it in different words, when a material mistake occurs in respect to the nature of the subject-matter of a sale, there was no mutual assent, and therefore the contract is void. This principle is well expressed in the maxim of the civil law, *cum in corpore dissentitur, apparet nullam esse exceptionem.*" Story on Sales, sec. 148, 458. Yet it was held in a Massachusetts case, that a vendee to whom goods other than those purchased had been delivered by a fraudulent vendor, could elect to take the substituted goods under a contract of sale, and hold them as against the fraudulent vendor. Gardner v. Lane, 91 Mass. (9 Allen) 492. See Cowles v. Bacon, 21 Conn. 451; s. c. 56 Am. Dec. 371; Dyer v. Cady, 20 Conn. 563; Grace v. Mercer, 10 B.

Mon. (Ky.) 157; *Matthews v. Light*, 32 Me. 305; *Copeland v. Copeland*, 28 Me. 525; *Stewart v. Emerson*, 52 N. H. 301, 318, 319; *Davis v. Handy*, 37 N. H. 65, 75; *Townsend v. Shepard*, 64 Barb. (N. Y.) 39, 53; *Pickard v. Sears*, 6 Ad. & El. 469. In *Townsend v. Shepard*, *supra*, a contract provided for the purchase by the plaintiff and sale by the defendant of a specified number of bales of cloves at a specified price per pound, to arrive "deliverable, sound, and in good order." The cloves arrived soon after making the contract, and on examination part of them proved to be sound and part neither sound nor in good order. The plaintiffs offered to sign the whole of the invoice, the sound as well as the unsound, and pay therefore the contract price. The court say "it is entirely clear that the plaintiffs could not have been required to receive the damaged cloves; it was the purchaser's option to receive or refuse the damaged or unsound cloves. The vendor could not compel the purchaser to receive them, but they might waive the objection that they were unsound, and the vendor might then deliver them."

Mistake as to name. — Kent says, "if the object of the contract be present, an error in the name does not vitiate it; as if A. gives a horse to C. (D. being present), says to him (C.) 'D., take this horse,' the gift is good notwithstanding the mistake in the name; for the presence of the grantee gives a higher degree of certainty of the identity of the person than the mention of his name." 2 Kent Com. 557. See *Smith v. Smith*, 1 Edw. Ch. (N. Y.) 189; *Doe v. Cranstoun*, 7 Mees. & W. 1; *Bacon's Maxims of the law*, Reg. 25; *Leake on Contr.* 334.

What passes. — Title to the subject-matter of the sale only passes, and where the minds of the parties do not meet upon the whole and exact terms of the contract, it is void.

Cutts v. Guild, 57 N. Y. 229, 234; *Fullerton v. Dalton*, 58 Barb. (N. Y.) 238, 239; *Ketchum v. Catlin*, 21 Vt. 191, 194. Thus where other property is held delivered with the subject-matter of the negotiation, no title to such other property will pass; *Ray v. Light*, 34 Ark. 421; *Bowen v. Sullivan*, 62 Ind. 281; s. c. 30 Am. Rep. 172; *Huthmacher v. Harris*, 38 Pa. St. 491; s. c. 80 Am. Dec. 502. Thus a party who purchased at an administrator's sale a "drill machine," which, unknown to the parties, contained money and other valuables, secreted therein by the decedent, it was held that the sale passed to the purchaser, the right to the machine and other constituent parts of it, but not to the valuables contained in it. *Huthmacher v. Harris*, 38 Pa. St. 491; s. c. 80 Am. Dec. 502. In *Ray v. Light*, *supra*, it was held that where a safe was sold on execution, no title passes to its contents. In a case where warehousemen had on storage two lots of flour, one belonging to A., and the other, a more valuable lot, belonging to B.; and the warehousemen by mistake delivered to a consignee of A. a portion of B.'s flour, which such consignee received and consumed, not knowing, supposing, or having any reason to believe that it was different from that which he ordered, and for that reason gained no advantage from the mistake, the court held that such consignee was not liable to the warehousemen in contract for the value of the flour, or any part of its value, and also that he was not liable in tort for its conversion. *Hills v. Snell*, 104 Mass. 173. The court say, "There is no privity of contract established between the plaintiffs and the defendant. Without such privity the possession and use or conversion of the property will not sustain an implied assumpsit. See *Ladd v. Rogers*, 93 Mass. (11 Allen) 209. The fact that the flour was delivered by mistake, the court say, "might

Thus, in *Thornton v. Kempster*,³ the sale was of ten tons of sound merchantable hemp, but it was intended by the vendor to sell St. Petersburg hemp, and by the buyer to purchase Riga Rhine hemp, a superior article. The broker had made a mistake in describing the hemp to the buyer, and the Court held that there had been no contract whatever, the assent of the parties not having really existed as to the same subject-matter of sale.⁴

So in *Raffles v. Wichelhaus*,⁵ there was a contract for the sale of "125 bales of Surat cotton, guaranteed middling fair merchants' Dhollerah, to arrive ex *Peerless* from Bombay," and the defendant pleaded to an action against him for not accepting the goods on arrival, that the cotton which he intended to buy was cotton on another ship *Peerless*, which sailed from Bombay, in October, not that which arrived in a ship *Peerless* that sailed in December, the latter being the cotton the plaintiff had offered to deliver. On demurrer, held that on this state of facts there was no *consensus ad idem*, no contract at all between the parties.⁶

§ 62. [In *Henkel v. Pape*¹ there was a mutual mistake as to the *quantity* of the thing sold, but as the defendant did

have entitled the plaintiffs to reclaim the property from one having it in possession, or to recover its value from one who had disposed of it without knowledge of the mistake." See *Chapman v. Cole*, 78 Mass. (12 Gray) 141; s. c. 71 Am. Dec. 739; see, also, *Dalton v. Hamilton*, 1 Hannay (N. B.) 422; *Best v. Boice*, 22 Up. Can. Q. B. 439. In the case where the owner of an old tannery sold it, and accidentally omitted to remove from the vats a few hides, which were discovered many years after by a laborer, it was held that they did not pass with the sale of the tannery, and belonged to the representatives of the original owner. *Livermore v. White*, 74 Me. 452; s. c. 43 Am. Rep. 600; 27 Alb. L. J. 414.

³ 5 Taunt. 786. See, also, *Keele v. Wheeler*, 7 M. & G. 665.

American authorities. — *Franklin v. Long*, 7 Gill & J. (Md.) 407; *Harvey v. Harris*, 112 Mass. 32; *Gardner v. Lane*, 91 Mass. (9 Allen) 492; s. c. 94 Mass. (12 Allen) 39; *Rice v. Dwight, Manuf. Co.*, 56 Mass. (2 Cush.) 80, 86; *Thompson v. Gould*, 37 Mass. (20 Pick.) 139; *Gibson v. Pelkie*, 37 Mich. 380; *Suydam v. Clark*, 2 Sandf. (N.Y.) 133; *Jennings v. Gratz*, 3 Rawle (Pa.) 168; s. c. 23 Am. Dec. 111; *Sheldon v. Capron*, 3 R. I. 171; *Ketchum v. Catlin*, 21 Vt. 191; *Allen v. Hammond*, 36 U. S. (11 Pet.) 63; bk. 9, L. ed. 633; *Hitchcock v. Giddings*, 4 Price, 135.

⁴ 2 H. & C. 906; 33 L. J. Ex. 160.

⁵ See, also, *Smidt v. Tiden*, L. R. 9 Q. B. 446, a mistake as to charter-parties caused by the broker's fraud.

⁶ *Riley v. Spotswood*, 23 Up. Can. C. P. 318.

¹ L. R. 6 Ex. 7.

not rely on his right to have the contract rescinded, the * decision does not involve the application of the [*57] principle now being considered.

§ 63. In *Phillips v. Bistoli*,¹ the defendant, a foreigner, not understanding our language, was sued as purchaser of some ear-rings, at auction, for the price of eighty-eight guineas, and alleged in defence that he thought the bid made by him was forty-eight guineas, and that there was a mistake in knocking down the articles to him at eighty-eight guineas, and Abbot C. J. left it to the jury to find whether the mistake had actually been made, as a test of the existence of a contract of sale.²

¹ 2 Barn & Cress. 511. See, also, *Cochrane v. Willis*, 1 Ch. 58.

² *Rovegno v. Defferari*, 40 Cal. 459; *Hartford & N. H. R. R. v. Jackson*, 24 Conn. 514; s. c. 63 Am. Dec. 177; *Calkins v. Griswold*, 18 N. Y. Sup. Ct. (11 Hun) 208.

Mistake as to price. — Where there is a mutual mistake as to the price of an article sold, there is no sale, and neither party will be bound. *Wilkinson v. Williamson*, 76 Ala. 163, 168; *Rovegno v. Defferari*, 40 Cal. 459, 462; *Rupley v. Daggett*, 74 Ill. 351; *Calkins v. Griswold*, 11 Hun (N. Y.), 208; *Harran v. Foley*, 62 Wis. 584; s. c. 22 N. W. Rep. 837; *Greene v. Bateman*, 2 Woodb. & M. C. C. 359; *Phillips v. Bistoli*, 2 Barn. & Cres. 511. Thus where personal property by mistake was offered for sale at a lower price than was intended, and the offer was accepted by one who knew or had good reason to believe that it was a mistake, the sale was not binding upon the vendor. *Rupley v. Daggett*, 74 Ill. 351; *Harran v. Foley*, 62 Wis. 584; s. c. 22 N. W. Rep. 837; *Greene v. Bateman*, 2 Woodb. & M. C. C. 359; *Webster v. Cecil*, 30 Beav. 62; *Tamplin v. James*, L. R. 15 Chan. Div. 221; 1 Whart. Contr. sec. 202 a. And in *Fear v. Jones*, 6 Iowa, 169, where the plaintiffs had two kinds of machines for sale, one selling for

\$195 and the other for \$315, which prices were shown to be posted in plaintiff's store, and to which defendants were shown at the time they inquired for the prices, and they undertook to pay \$195 for a machine, and a bill of sale was executed, which in its terms described a machine of a higher value, and they received one of that class, and when notified of the mistake they refused to deliver up the machine, the court held that there was no sale, and that the defendants would be liable for the value of the machine received. However, a different doctrine was recently held in Georgia in a case of *Star Glass Co. v. Longley*, 64 Ga. 576, in one case A. prices goods to B., who ordered at the price named, and A. delivered the goods ordered to a common carrier, consigned to B. After the receipt of the goods B. received a notice from A. that there was a mistake in the prices, and that the goods must not be used except at a higher price. In a suit for such higher price it was held that B.'s right to hold the goods at the price first named was not affected by A.'s notice. And where there is a mutual misunderstanding between the parties in regard to the amount of the consideration to be paid on a supposed contract of sale, a subsequent sale between

§ 64. And so if the parties have expressed themselves in language so vague and unintelligible that the Court find it impossible to affix a definite meaning to their agreement, it cannot take effect.¹ Thus in *Guthing v. Lynn*,² the action

the apparent vendor passes a valid title. *Rovegno v. Defferari*, 40 Cal. 459, 462.

¹ *An unintelligible contract is invalid.* — See *Wheelan v. Sullivan*, 102 Mass. 204; *Hurley v. Brown*, 98 Mass. 545; *Morton v. Dean*, 54 Mass. (13 Metc.) 385; *Atwood v. Cobb*, 33 Mass. (16 Pick.) 227; s. c. 26 Am. Dec. 657; *Cummer v. Butts*, 40 Mich. 322; s. c. 29 Am. Rep. 530; *Caswell v. Gibbs*, 33 Mich. 331; *Crane v. Partland*, 9 Mich. 493; *Buckmaster v. Consumers' Ice Co.*, 5 Daly (N. Y.) 313; *Hazard v. New England Marine Ins. Co.*, 1 Sumn. C. C. 218; *Greene v. Bateman*, 2 Woodb. & M. C. C. 359; *Smidt v. Tiden*, L. R. 9 Q. B. 446; s. c. 9 Eng. Rep. 379; *Coles v. Hulme*, 8 Barn. & Cres. 568, 573; *Guthing v. Lynn*, 2 Barn. & Adol. 232; *Bayley v. Fitzmaurice*, 8 El. & Bl. 664; s. c. 9 H. L. Cas. 78; Metc. on Contr. 316; 2 Pars. on Contr. 561; 1 Chitty on Contr. 92, 93; 1 Sugd. V. & P. (8 Am. ed.) 134. Thus a written agreement which does not show who the parties to it are is void for uncertainty. *Webster v. Ela*, 5 N. H. 540. Where the price of an article sold was made to be regulated by a certain profit to the vendor is void for uncertainty. *Buckmaster v. Consumers' Ice Co.*, 5 Daly (N. Y.) 313.

Ambiguous contract. Where offer by mistake is ambiguous. — Where the offer by mistake is ambiguous, the receiver claiming an unreasonable meaning, and without notice to, or inquiry of, the sender orders the goods, he is liable as if no proposition had been sent. *Butler v. Moses*, 43 Ohio St. 166; s. c. 1 West. Rep. 50.

Whether the contract be such as can be proved by parol or is required

by the statute of frauds to be in writing, it must be certain and unequivocal in all its essential elements, either within itself or by reference to some other agreement or matter. *Jordan v. Deaton*, 23 Ark. 704; *Agard v. Valencia*, 39 Cal. 292; *Minturn v. Baylis*, 33 Cal. 129; *Morrison v. Rosignol*, 5 Cal. 64; *Miller v. Cotten*, 5 Ga. 341; *Bowman v. Cunningham*, 78 Ill. 48; *Allen v. Webb*, 64 Ill. 342; *Fitzpatrick v. Beatty*, 6 Ill. (1 Gilm.) 454; *Waters' Heirs v. Brown*, 7 J. J. Marsh. (Ky.) 123; *Burke v. His Creditors*, 9 La. An. 56; *Reese v. Reese*, 41 Md. 554; *Gelston v. Sigmond*, 27 Md. 334; *McClintock v. Laing*, 22 Mich. 212; *Millard v. Ramsdell*, 1 Harr. Ch. (Mich.) 373; *McMurdrie v. Bennette*, 1 Harr. Ch. (Mich.) 124; *Sherburne v. Shaw*, 1 N. H. 131; s. c. 8 Am. Dec. 47; *McKibbin v. Brown*, 14 N. J. Eq. (1 McCart.) 13; *Lokerson v. Stillwell*, 13 N. J. Eq. (2 Beas.) 357; *Rockwell v. Lawrence*, 6 N. J. Eq. (2 Halst.) 90; *Robeson v. Hornbaker*, 3 N. J. Eq. (2 H. W. Gr.) 60; *Stanton v. Miller*, 58 N. Y. 192; *Buckmaster v. Thompson*, 36 N. Y. 558; *Abeel v. Radcliff*, 13 Johns. (N. Y.) 297; s. c. 7 Am. Dec. 377; *Bailey v. Ogden*, 3 Johns. (N. Y.) 399; s. c. 3 Am. Dec. 509; *Hammer v. McEldowney*, 46 Pa. St. 334; *Parrish v. Koons*, 1 Pars. Sel. Cas. (Pa.) 78; *Givens v. Calder*, 2 Deasus. (S. C.) Eq. 172; s. c. 2 Am. Dec. 686; *Meadows v. Meadows*, 3 McC. (S. C.) 458; s. c. 15 Am. Dec. 645; *Pigg v. Corder*, 12 Leigh (Va.) 69.

² 2 B. & Ad. 232. See, also, *Bourne v. Seymour*, 24 L. J. C. P. 207; and *Pearce v. Watts*, 20 Eq. 492, the case of a sale of real estate; *Robinson v. Bullock*, 58 Ala. 618; *Buckmaster v. Consumers' Ice Co.*, 5

was on an alleged warranty on the sale of a horse, and the declaration averred the sale to have been for "a certain price or sum of money, to wit, 63*l*." The proof was of a sale for sixty guineas, *and* "if the horse was lucky to the plaintiff he was to give 5*l*. more, or the buying of another horse." This was insisted on as a variance. On motion for nonsuit according to leave reserved, the Court refused to nonsuit, on the ground that the additional clause was unintelligible; that no man could say under what circumstances a horse was to be considered "lucky," nor could any definite meaning be attached to the words "or the buying of another horse," as part of the price of the horse sold. The contract must therefore be considered as proven for the price of 63*l*., the remainder being looked on as some honorary understanding between the parties.⁸

Daly (N. Y.) 313; Baker v. Lyman, 38 Up. Can. Q. B. 498.

⁸ *Contract to furnish articles "to satisfaction."*—Where a person undertakes to manufacture an article or deliver goods, which he guarantees shall be satisfactory to the buyer, the purchaser is sole judge whether the article is satisfactory, and there is no remedy left for the seller, where the purchaser is not satisfied. McClure v. Briggs, 58 Vt. 82; s. c. 1 New Eng. Rep. 621; 2 Atl. Rep. 583. In the case of Silsby Manf. Co. v. Chico, 24 Fed. Rep. 893, the Circuit Court of the United States say: "The authorities are abundant to the effect that upon a contract containing a provision that an article to be made and delivered shall be satisfactory to the purchaser, it must be satisfactory to him, or he is not required to take it. It is not enough that he ought to be satisfied with the article; he must be satisfied, or he is not bound to accept it. Such a contract may be unwise, but of its wisdom the party so contracting is to be his own judge; and if he deliberately enters into such an agreement, he must abide by it. To this effect are: Hallidie v. Sutter St. R. R. Co., 63 Cal. 575; Zaleski v.

Clark, 44 Conn. 218; s. c. 26 Am. Rep. 446; Brown v. Foster, 113 Mass. 136; s. c. 18 Am. Rep. 463; McCarran v. McNulty, 73 Mass. (7 Gray) 139; Gibson v. Cranage, 39 Mich. 49; Wood Reaping and Mowing Machine Co. v. Smith, 50 Mich. 565; s. c. 215 N. W. Rep. 906; Heron v. Davis, 3 Bosw. (N. Y.) 336; Hoffman v. Gallaher, 6 Daly (N. Y.) 42; Gray v. Central R. R. Co., 11 Hun (N. Y.) 70." Thus where one undertakes "to satisfaction" to make a suit of clothes (Brown v. Foster, 113 Mass. 136; s. c. 18 Am. Rep. 463), to fill a particular place as agent (Tyler v. Ames, 6 Lans. (N. Y.) 280), to mould a bust (Zaleski v. Clark, 44 Conn. 218; s. c. 26 Am. Rep. 446), or paint a portrait (Gibson v. Cranage, 39 Mich. 49; Hoffman v. Gallaher, 6 Daly (N. Y.) 42; Moore v. Goodwin, 43 Hun (N. Y.) 534), he may not unreasonably expect to be bound by the opinion of his employer, honestly entertained; and neither the opposite party nor the jury can decide that he ought to be satisfied with the article made. Moore v. Goodwin, 43 Hun (N. Y.) 534. See Wood Reaping & Mowing Machine Co. v. Smith, 50 Mich. 565; s. c. 15 N. W. Rep.

906. Thus it has been held that a contract to erect a patent hydraulic hoist "warranted satisfactory in every respect," constitutes the purchaser sole judge of its fitness, and does not mean that it should be such as would satisfy other persons or that the promisee reasonably ought to be satisfied with it. *Singerly v. Thayer*, 108 Pa. St. 291; s. c. 1 Cent. Rep. 51. And where the contract under which work is done provides for approval by a third party, no right to money earned or cause of action accrues, until that party's certificate is procured. *Kirtland v. Moore* (N. J.), 1 Cent. Rep. 466; *Tetz v. Butterfield*, 54 Wis. 242; s. c. 11 N. W. Rep. 531; *Oakwood Retreat Association v. Rathbone*, 65 Wis. 177; s. c. 26 N. W. Rep. 742. But where the purchaser is in fact satisfied, but fraudulently and in bad faith declares that he is not satisfied, the contract has been fully performed by the vendor, and the purchaser is bound to accept the article. *Silsby Manf. Co. v. Chicago*, 24 Fed. Rep. 893. Thus it was held in *Lynn v. Baltimore & O. R. R. Co.*, 60 Md. 404; s. c. 45 Am. Rep. 641, that on a contract by a corporation to purchase certain goods subject to inspection and approval by its agent, the corporation is liable if the agent fraudulently or in bad faith disapproves of the goods.

In *Connecticut*, in the case of *Zaleski v. Clark*, 44 Conn. 418; s. c. 26 Am. Rep. 446, where a sculptor undertook to finish a bust to the satisfaction of the defendant, who refused to accept the work when done, though in fact a fine piece of workmanship, the Supreme Court held that there could be no recovery. The court say: "A contract to produce a bust perfect in every respect, and one with which the defendant ought to be satisfied, is one thing; and undertaking to make one with which she will be satisfied is quite another thing. The latter can only be deter-

mined by the defendant herself. It may have been unwise in the plaintiff to make such a contract, but having made it, he is bound by it." See also *Gibson v. Cranage*, 39 Mich. 49; *Gray v. Cent. R. R. Co. of N. J.*, 11 Hun (N. Y.) 70. The case of *Zaleski v. Clark*, 44 Conn. 418; s. c. 26 Am. Rep. 446, is founded upon *Brown v. Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; *McCarren v. McNulty*, 73 Mass. (7 Gray) 139, cited below.

In *Massachusetts*, in a case where the plaintiff undertook to make a bookcase for a society which was to be "to the satisfaction" of the president, the court say: "It may be that the plaintiff was injudicious or indiscreet in undertaking to labor and furnish materials for a compensation, the payment of which was made dependent upon a contingency so hazardous or doubtful as the satisfaction of a party particularly in interest. But of that he was the sole judge. Against the consequences resulting from his own bargain the law can afford him no relief." *McCarren v. McNulty*, 73 Mass. (7 Gray) 139. And this case was subsequently followed in *Brown v. Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463, where the court say: "Although the compensation of the plaintiff for valuable service and materials may thus be dependent upon the caprice of another, who unreasonably refuses to accept the articles manufactured, yet he cannot be relieved from the contract into which he has voluntarily entered."

In *Michigan*, in the case of *Wood Reaping & Mowing Machine Co. v. Smith*, 50 Mich. 555; s. c. 15 N. W. Rep. 906, which was a suit for the contract price of a machine warranted to be satisfactory to the defendant, it was held that "a stipulation in the contract of sale that it shall be of no effect unless the goods are satisfactory, is to be construed, according to the circumstances, as reserving to the promisor the absolute right to reject them without giving any rea-

son, or as binding him to decide on fair and reasonable grounds. In one case his conclusion cannot be reviewed, but it can be in the other." The court say that "the cases where the parties provide that the promisor is to be satisfied, or to that effect, are of two classes; and whether the particular case at any time falls within the one or the other must depend on the special circumstances, and the question must be one of construction. In the one class the right of decision is completely reserved to the promisor, and without being liable to disclose reasons or account for his course; and all right to inquire into the grounds of his action and overhaul its determination is absolutely excluded from the promisee, and from all tribunals. It is sufficient for the result that he willed it. The law regards the parties as competent to contract in that manner, and if the facts are sufficient to show that they did so, their stipulation is the law of the case. The promisee is excluded from setting up any claim for remuneration, and is likewise debarred from questioning the grounds of decision on the part of the promisor, or the fitness or propriety of the decision itself. The cases of this class are generally such as involve the feelings, taste, or sensibility of the promisor, and not those gross considerations of operative fitness or mechanical utility which are capable of being seen and appreciated by others. But this is not always so. It sometimes happens that the right is fully reserved where it is the chief ground, if not the only one, that the party is determined to preserve an unqualified option, and is not willing to leave his freedom of choice exposed to any contention or subject to any contingency. He is resolved to permit no right in any one else to judge for him, or to pass on the wisdom or unwisdom, the justice or injustice, of his action. Such is his will. He will not enter into any bar-

gain, except upon the condition of reserving the power to do what others might regard as reasonable. The following cases sufficiently illustrate the instances of the first class: *Zaleski v. Clark*, 44 Conn. 218; s. c. 26 Am. Rep. 446; *Brown v. Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; *McCarren v. McNulty*, 73 Mass. (7 Gray) 139; *Gibson v. Cranage*, 39 Mich. 49; *Hart v. Hart*, 22 Barb. (N. Y.) 606; *Tyler v. Ames*, 6 Lans. (N. Y.) 280; *Rossiter v. Cooper*, 23 Vt. 522; *Taylor v. Brewer*, 1 Maule & Sel. 290. In the other class the promisor is supposed to undertake that he will act reasonably and fairly, and found his determination on grounds which are just and sensible; and from thence springs a necessary implication that his decision, in point of correctness, and the adequacy of the grounds of it, are open considerations, and subject to the judgment of judicial triers. Among the cases application to this class are *Daggett v. Johnson*, 49 Vt. 345, and *Hartford Manuf. Co. v. Brush*, 43 Vt. 528."

In *New York*, where the plaintiff repaired and set up the boilers for the defendant, under the contract that he was not to be paid until the "defendants were satisfied with the boilers so changed were a success," the defendants claimed that they alone were to determine the question whether they were satisfied that the boilers as changed were a success. The court held that this was error, and that as the work was completed according to contract, and the defendants used it without objection or complaint, the time for payment had come, and that the plaintiff had a right of action for the contract price in case payment was refused. The reason upon which this was founded seems to be "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with." *Duplex Safety Boiler Co. v. Garden*, 101 N. Y. 387; s. c. 54 Am. Rep. 709; 4 N. E. Rep. 749. In

Folliard v. Wallace, 2 Johns. (N. Y.) 395, W. covenanted that, in case the title to a lot of land conveyed to him by F. should prove good and sufficient in law against all other claims, he would give to F. \$150, three months after he should be "well satisfied" that the title was undisputed. Upon suit brought the defendant set up that he was "not satisfied," and the plea was held bad, the court saying: "A simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and cannot be regarded." This decision was followed in *Miesell v. Globe M. L. Insurance Co.*, 76 N. Y. 115, and *Brooklyn v. Brooklyn R. R. Co.*, 47 N. Y. 475.

In *Pennsylvania*, it was held in the recent case of *Singerly v. Thayer*, 108 Pa. St. 291; s. c. 1 Cent. Rep. 52; 2 Atl. Rep. 230, that a contract to furnish an article which shall be satisfactory to the purchaser is not complied with by proof that the article furnished is made in a workmanlike manner, and performs its intended purpose in a manner which ought to be satisfactory to the purchaser. The contract in this case was to erect an elevator "satisfactory in every respect," and the court held the meaning of the language used was that the elevator, when erected, should prove satisfactory to the person for whom it was erected. As a matter of fact the elevator did not prove satisfactory, and suit was brought on the contract for the price. The court say: "When the agreement is to make and furnish an article to the satisfaction of the person for whom it is to be made, numerous authorities declare it is not a compliance with the contract to prove that he ought to have been satisfied. It was so held in *Gray v. Central Railroad Co. of N. J.*, 11 Hun (N. Y.) 70, where the contract was for the purchase of a steamboat; in *Brown v. Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463, where the agreement was

to make a suit of clothes; in *Zaleski v. Clark*, 44 Conn. 218; s. c. 26 Am. Rep. 446, on a contract for a plaster bust of the deceased husband of the defendant; in *Gibson v. Cranage*, 39 Mich. 49, where a portrait was to be satisfactory to the defendant; and in *Hoffman v. Gallaher*, 6 Daly (N. Y.) 42, where a portrait of defendant was to be satisfactory to his friends."

In *Vermont*, in the case of *McClure v. Briggs*, 58 Vt. 82; s. c. 1 New Eng. Rep. 621; 2 Atl. Rep. 583, where A set up an organ in B's house, upon an agreement that B should keep it and pay for it, if it proved satisfactory to him. B thought, without cause, that he was dissatisfied, and notified A. The court held that, provided he acted in good faith, he was the sole judge as to his satisfaction with the organ. See *Daggett v. Johnson*, 49 Vt. 435; *Hartford Manuf. Co. v. Brush*, 43 Vt. 528. The court say: "But it is said that he was bound to be satisfied, as he had no ground to be dissatisfied. He was bound to act honestly, and to give the instrument a fair trial, and such as the seller had a right, under the circumstances, to expect he would give it, and herein to exercise such judgment and capacity as he had; for, by the contract, he was the one to be satisfied, and not another for him. If he did this, and was still dissatisfied, and that dissatisfaction was real and not feigned, honest and not pretended, it is enough, and plaintiffs have not fulfilled their contract, and all these elements are gatherable from the report. This is the doctrine of *Daggett v. Johnson*, 49 Vt. 345, and of *Hartford Manuf. Co. v. Brush*, 43 Vt. 528. In the former case the defendant was required to bring to the trial of the evaporator only honesty of purpose and judgment according to his capacity, to ascertain his own wishes, and was not required to exercise even ordinary skill and judgment in making his determination. *Daggett v. Johnson*, 49 Vt. 345, turned on an error in the admission of testimony;

but Judge Redfield goes on to discuss the merits of the case somewhat, following substantially in the line of *Brush's Case*, and citing it as authority. But *Daggett v. Johnson*, *supra*, is distinguishable in its facts from *Brush's Case* and from this case, in that the defendant omitted to test the pans in the very respect in which he knew it was claimed their excellence consisted. In *McCarren v. McNulty*, 73 Mass. (7 Gray) 139, plaintiff agreed to make a bookcase for defendants, of a certain kind and dimensions, in a good, workmanlike manner, 'to the satisfaction' of one of the defendants, and an action for work and labor in making it was held not to be maintained by proof that it was made according to the contract, without also proving that it was satisfactory to or accepted by that defendant. The court said that against the consequences resulting from his own bargain the law could not relieve the plaintiff; that, having assumed the obligations and risk of the contract, his legal rights were to be ascertained and determined solely by its provisions. In *Brown v. Foster*, 113 Mass. 136, plaintiff agreed to make defendant a satisfactory suit of clothes, but defendant returned the suit as unsatisfactory. The court said the plaintiff could recover only upon the contract as made; and that, even though the clothes were such that the defendant ought to have been satisfied with them, it was yet in his power to reject them as unsatisfactory, and that it was not for any one else to decide whether a refusal to accept was reasonable or not when the contract permitted the defendant himself to decide that question. In *Zaleski v. Clark*, 44 Conn. 218; s. c. 6 Am. Rep. 446, plaintiff made a plaster bust of defendant's deceased husband, under a contract that she was not bound to take it unless she was satisfied with it. When it was finished, she was not satisfied with it, and refused to accept it. It was found

that the bust was a fine piece of work, a correct copy of a photograph furnished by the defendant, and that it accurately portrayed the features of the subject, and that the only fault found with it was that it did not have the expression of the deceased when living, which was caused by no imperfection of the work, but by the nature of the material. The court said plaintiff had not fulfilled his contract; that it was not enough to say that defendant ought to have been satisfied, and that her dissatisfaction was unreasonable; that she, and not the court, was entitled to judge of that; that a contract to make a bust perfect in all respects, and with which the defendant ought to be satisfied, was one thing, and an undertaking to make one with which she would be satisfied was quite another thing; that the former could be determined only by experts, and the latter could be determined only by the defendant herself."

In *Wisconsin*, in the case of *Tetz v. Butterfield*, 54 Wis. 242, s. c. 11 N. W. Rep. 531, it is said that where a building contract provides for the acceptance of the architect, evidence is admissible to show that he acted collusively and in bad faith. And in *Glacius v. Black*, 50 N. Y. 145, where by the terms of a contract for repairing a building it was provided that the materials to be furnished should be of the best quality and the workmanship performed in the best manner, subject to the acceptance or rejection of the architect, and all to be in strict accordance with the plans and specifications, the work to be paid for "when completely done and accepted," it was held that the acceptance by the architect did not relieve the contractors from their agreement to perform the work according to the plans and specifications; nor did his acceptance of a different class of work, or inferior materials, from those contracted for, bind the owner to pay for them; that the provisions

§ 65. But an agreement is not to be deemed unintelligible because of some error, omission, or mistake in drawing it up, if the real nature of the mistake can be shown, so as to make the bargain intelligible.¹ Thus, in *Coles v. Hulme*,²

for acceptance was merely an additional safeguard against defects not discernible by an unskilled person. And in the recent case of *Oakwood Retreat Ass'n v. Rathbone*, 65 Wis. 177; s. c. 26 N. W. Rep. 742, it was held that when a contract provides for the performance of work at a stipulated price, to the satisfaction of an architect named therein, who is employed to adjust all claims of the parties to the agreement, and a bond is given to secure a faithful performance of the contract, where the party agreeing to do the work does not fully perform such contract, the other party may sue the principal and sureties on the bond for a breach of the contract before the architect has adjusted any claim arising out of the breach.

The rule of construction is that all contracts or agreements shall have a reasonable interpretation, according to the intention of the parties. In ascertaining what those intentions are it is essential to consider the subject-matter of the contract or agreement; in giving a meaning to the terms used therein, and the situation and the true intention of all the parties, as well as the subject-matter of the contract, must always be considered. *Brown v. Slater*, 16 Conn. 192, 196; s. c. 41 Am. Dec. 136; *Robinson v. Fiske*, 25 Me. 401; *Littlefield v. Winslow*, 19 Me. 394; *Patrick v. Grant*, 14 Me. 233; *Howland v. Leach*, 28 Mass. (11 Pick.) 151, 154; *Hopkins v. Young*, 11 Mass. 302; *Fowle v. Bigelow*, 10 Mass. 379; *Sumner v. Williams*, 8 Mass. 162, 214; s. c. 5 Am. Dec. 83; *Nettleton v. Billings*, 13 N. H. 446; *Osgood v. Hutchins*, 6 N. H. 375; *Hasbrook v. Paddock*, 1 Barb. (N. Y.) 635; *Wilson v. Troup*,

2 Cow. (N. Y.) 195; s. c. 14 Am. Dec. 458; *Whallon v. Kauffman*, 19 Johns. (N. Y.) 104; *Hollingsworth v. Fry*, 4 U. S. (4 Dall.) 345; bk. 1, L. ed. 860; *Washburn v. Gould*, 3 Story C. C. 122, 159; *Saward v. Anstey*, 2 Bing. 522; *Robertson v. French*, 4 East, 135; *Carbonel v. Davies*, 1 Str. 394; *Milbourn v. Ewart*, 5 T. R. 381, 385; *Doe v. Burt*, 1 T. R. 703; 2 Cow. & Phil. Ev. 1399, note 957; *Greenl. Ev.* 327; 1 Sugd. V. & P. on S. V. & P. (8 Am. ed.) 169, 170. To ascertain the meaning of a written offer to sell, all its parts and words must be examined in the light of the circumstances, and a receiver of the offer must act on the true intent and meaning of the sender. *Butler v. Moses*, 43 Ohio St., 160; s. c. 1 West. Reb. 50.

² 8 B. & C. 568. See, also, *Cleveland v. Smith*, 2 Story C. C. 278; *Waugh v. Bussell*, 5 Taunt. 707; *Elliott's Case*, 2 East P. C. 951.

Contract of sale void for uncertainty.—In an action on a contract to employ an agent to sell on commission, which stipulated that “for good cause this agreement shall be cancelled upon sixty days’ notice by either party,” the Supreme Court of Michigan held it impossible to give any definite meaning to the term “for good cause,” saying: “It is impossible to say that the wills of the parties concurred and that each meant exactly what the other did, or even to say what either meant.” *Cummer v. Butts*, 40 Mich. 322; s. c. 29 Am. Rep. 530. Agreements, either written or verbal, which are so vague and indefinite in their terms, that the intention of the parties cannot be fairly and reasonably collected from them, are void for uncertainty. *Robinson*

a bond to pay 7700 was allowed to be corrected by adding * the word "pounds," the recitals in the condition showing that that must have been the meaning of the parties.⁸ [*58]

v. Bullock, 58 Ala. 618; *Adams v. Adams*, 26 Ala. 272; *Erwin v. Erwin*, 25 Ala. 236; *Moore v. Smith*, 19 Ala. 774, 783; *Watson v. Byers*, 6 Ala. 393; *Shakespeare v. Markham*, 72 N. Y. 400; *Stanton v. Miller*, 58 N. Y. 192; *Sherman v. Kitsmiller*, 17 Serg. & R. (Pa.) 45; *Buckston v. Lister*, 3 Atk. 386; *Morgan v. Milman*, 3 De G. M. & G. 24; *Wilks v. Davis*, 3 Meriv. 507; *Figs v. Culer*, 3 Stark. 139; *Rose v. Cunynghame*, 11 Ves. 555; *Walpole v. Orford*, 3 Ves. 402; 1 Chitty on Contr. 92. To be valid and binding a contract must be sufficiently definite and certain to establish rights and fix liabilities under it. An agreement to purchase ice delivered on a future day, at a price which should afford the party delivering a net profit not exceeding \$1.00 per ton, has been held void for uncertainty. *Buckmaster v. Consumers' Ice Co.*, 5 Daly (N. Y.) 313. An agreement in writing for the conveyance of "a piece of land" which does not, either in itself, or by reference to any other writing, contain means of identifying the boundaries, is void for uncertainty. *Whelan v. Sullivan*, 102 Mass. 204; *Hurley v. Brown*, 98 Mass. 545; *Morton v. Dean*, 54 Mass. (13 Metc.) 385; *Atwood v. Cobb*, 33 Mass. (16 Pick.) 227; s. c. 26 Am. Dec. 327. Parol testimony of a previous agreement, which is the only means of identification, referred to in the memorandum, can be taken into consideration to complete it. *Waterman v. Meigs*, 54 Mass. 497.

A contract which may be cancelled by either party, "for good cause" is void for uncertainty. *Cummer v. Butts*, 40 Mich. 322; s. c. 29 Am. Rep. 530. See *Caswell v. Gibbs*, 33 Mich. 331; *Crane v. Partland*, 9 Mich. 493; *Hazard v. New England*

Marine Insurance Co., 1 Sumn. C. C. 218; *Greene v. Bateman*, 2 Woodb. & M. C. C. 359; *Smidt v. Tiden*, L. R. 9 Q. B. 446; s. c. 9 Moak Eng. Rep. 379; *Guthing v. Lynn*, 2 Barn. & Ad. 232; *Coles v. Hulme*, 8 Barn. & Cres. 568, 573; *Baley v. Fitzmaurice*, 8 El. & Bl. 664; s. c. 9 H. L. Cas. 78; *Cooper v. Hood*, 28 L. J. Ch. 212.

⁸ *Filling blanks in written contracts.*—It is a question for the jury to determine, what words or figures were intended to be inserted in blanks left in written contracts. *Burnham v. Allen*, 67 Mass. (1 Gray) 496; *Boyd v. Brotherson*, 10 Wend. (N. Y.) 93; see also, *Dana v. Fiedler*, 12 N. Y. 40; s. c. 62 Am. Dec. 130; *Cabarga v. Seeger*, 17 Pa. St. 514; as is also the deciphering illegible letters or figures. *Armstrong v. Burrows*, 6 Watts (Pa.) 266. Where a note was intended to be made for the sum of eight hundred dollars, and was indorsed by the payee, for the accommodation of the maker, and delivered to him, and by mistake the words "eight hundred" were omitted, so that the note purported to be for eight, the maker, without the assent of the indorser, inserted the words "one hundred dollars," and in an action by the holder, it was held that the indorser could not object to the insertion of those words. *Boyd v. Brotherson*, 10 Wend. (N. Y.) 93.

As to the authority of the holder of negotiable paper, executed in blank, to fill such blanks, see *Coburn v. Webb*, 56 Ind. 96; s. c. 26 Am. Rep. 15; *Rich v. Starbuck*, 51 Ind. 87; *Ives v. Farmer's Bank*, 84 Mass. (2 Allen) 236; *Hunt v. Adams*, 6 Mass. 519; *McRaven v. Crisler*, 53 Miss. 542; *McGrath v. Clark*, 56 N. Y. 34; s. c. 15 Am. Rep. 372; *Redlich v. Doll*, 54 N. Y. 234; s. c. 13

So in *Wilson v. Wilson*,⁴ Lord St. Leonards said that "both Courts of law and Courts of equity may correct an obvious mistake on the face of an instrument without the slightest difficulty";⁵ and his Lordship cited a case in *Douglas*⁶ where the condition of a bond declared that it was to be void if the obligor did *not* pay what he promised, and the Court struck out the word "not" as a palpable error. And the same principle was established in *Lloyd v. Lord Say and Seale*,⁷ in the King's Bench, and affirmed in House of Lords; and in *Langdon v. Goole*:⁸ the omitted name of the grantor being supplied by the Court in the first case, and that of the obligee in the second.⁹

§ 66. But care must be taken not to confound a common mistake as to the subject-matter of the sale, or the price, or the terms, which prevent the sale from ever coming into existence by reason of the absence of a *consensus ad idem*, with a mistake made by one of the parties as to a collateral fact, or what may be termed a mistake in motive. If the buyer purchases the very article at the very price and on the very terms intended by him and by the vendor, the sale is complete by mutual assent, even though it may be liable to be avoided for fraud, illegality or other cause; or even though the buyer or the seller may be totally mistaken in the motive which induced the assent.¹

Am. Rep. 473; *Van Duzer v. Howe*, 21 N. Y. 531; *Hardy v. Norton*, 66 Barb. (N. Y.) 527; *Kitchen v. Place*, 41 Barb. (N. Y.) 465; *Griggs v. Howe*, 31 Barb. (N. Y.) 100; *Mitchell v. Culver*, 7 Cow. (N. Y.) 336; *Norris v. Badger*, 6 Cow. (N. Y.) 449; *Smith v. Wyckoff*, 3 Sandf. Ch. (N. Y.) 77; *Clute v. Small*, 17 Wend. (N. Y.) 238; *Nichol v. Bate*, 10 Yerg. (Tenn.) 429; *Frank v. Lilienfeld*, 33 Gratt. (Va.) 377, 384; *Michigan Ins. Co. v. Leavenworth*, 30 Vt. 11; *Snyder v. Van Doren*, 46 Wis. 602; s. c. 32 Am. Rep. 778; *Bulkeley v. Butler*, 2 Barn. & Cres. 425; *Usher v. Dauncey*, 4 Campb. 97; *Powell v. Duff*, 3 Campb. 182; *Russel v. Langstaff*, 2 Doug. 514; *Schultz v. Astley*, 2 Bing.

(N. C.) 544; s. c. 29 Eng. C. L. 414; *Kershaw v. Cox*, 3 Esp. 246; s. c. cited, 10 East, 437; *Jacobs v. Hart*, 2 Stark. 45.

⁴ 5 H. L. C. 40; and see *Bird's Trusts*, 3 Ch. D. 214; *Burchell v. Clark*, 2 C. P. D. 88, C. A.

⁵ 5 H. C. L. at p. 66.

⁶ Anonymous, *per* Buller, J., in *Bache v. Proctor*, Doug. 384.

⁷ 10 Mod. 46, and 4 Browne's P. C. 73.

⁸ 3 Lev. 21.

⁹ *Marion v. Faxon*, 20 Conn. 486; *Sisson v. Donnelly*, 36 N. J. L. (7 Vr.) 432; *Bickford v. Cooper*, 41 Pa. St. 142; *Cooke v. Graham*, 3 Cr. C. C. 229; *Jones v. McIntosh*, 2 Pug. (N. B.) 343.

¹ *Wheat v. Cross*, 31 Md. 99; Mc-

§ 67. And when the mistake is that of one party alone, it must be borne in mind that the general rule of law is, that whatever a man's *real* intention may be, if he *manifests* an intention to another party, so as to induce the latter to act upon it in making a contract, he will be estopped from denying that the intention as manifested was his real intention.¹

This point is treated under the subject of "estoppel," *post*, Book V., Part I., Ch. 2.

§ 68. * A mistake by the buyer in supposing that the article bought by him will answer a certain purpose, for which it turns out to be unavailable, is not a mistake as to the subject-matter of the contract, but as to a collateral fact, and affords no ground for pretending that he did not assent to the bargain, whatever may be his right afterwards to rescind it, if the vendor warranted its adaptability to the intended purpose. Thus, in *Chanter v. Hopkins*,¹ *Ollivant v. Bayley*,² and *Prideau v. Bunnett*,³ the purchasers had ordered specific machines from the patentees, and attempted to justify their refusal to pay, on the ground that the machines had totally failed to answer the purpose intended; but it was held that in the absence of a warranty by the vendors, the contract was binding on the purchasers,

Lean v. Robinson, 2 Pug. & B. (N. B.) 83.

¹ *Per* Lord Wensleydale, in *Freeman v. Cooke*, 2 Ex. 654; *Doe v. Oliver*, and cases in notes, 2 Smith's L. C. (ed. 1879) 775; *Cornish v. Abington*, 4 H. & N. 549; 28 L. J. Ex. 262; *Alexander v. Worman*, 6 H. & N. 100; 30 L. J. Ex. 198; *Van Toll v. South Eastern Railway Company*, 12 C. B. N. S. 75; 31 L. J. C. P. 241; *Carr v. London and North Western Railway Company*, L. R. 10 C. P. 307, *per* Brett, J.; *Thomas v. Brown*, 1 Q. B. D. 714. See *Zuchtmann v. Roberts*, 109 Mass. 53; s. c. 12 Am. Rep. 663. In *Zuchtmann v. Roberts*, 109 Mass. 53; s. c. 12 Am. Rep. 663, it is said that to constitute an estoppel, in such case the party must have designedly made an admission inconsis-

tent with the defence of claim, which he proposed to set up, and another party must have, with his knowledge and consent, so acted on that admission that he will be injured by allowing an admission to be disproved. See, also, *Turner v. Coffin*, 94 Mass. (12 Allen) 401; *Andrews v. Lyons*, 93 Mass. (11 Allen) 349; *Plumer v. Lord*, 91 Mass. (9 Allen) 455; *Audenreid v. Bettelley*, 87 Mass. (5 Allen) 382; *Hawes v. Marchant*, 1 Curt. C. C. 136, 144; *Powell v. Smith*, L. R. 14 Eq. Cas. 85; *Hotson v. Browne*, 9 C. B. N. S. 442; s. c. 99 Eng. C. L. 441; 2 Chitty on Contr. (11 Am. ed.) 1022, 1023; *Leake on Contr.* p. 8, 168, 169.

¹ 4 M. & W. 399.

² 5 Q. B. 288.

³ 1 C. B. N. S. 618.

notwithstanding their mistaken belief that the machines would answer their purpose.⁴

§ 69. In *Scott v. Littledale*,¹ the vendor made a singular mistake. He sold a hundred chests of tea by a wrong sample. A sale by sample imports, as will be seen hereafter, a warranty by the vendor that the bulk equals the sample. On demurrer to a plea on equitable grounds, setting up this mistake as rendering the contract void for want of mutual assent, the Queen's Bench held that the contract was not void; that if the quality of the bulk was inferior to the sample, the buyer had the right to waive the objection; and the court said: "Possibly a court of equity might have given the defendant some relief, but it certainly would not have set aside the contract." It is worth observing, that in this case the defendant made no mistake as to the subject-matter of the contract. He sold the very tea, for the very price, and on the very terms which he intended, but he [*60] made * a mistake in *giving a warranty* that it was of a particular quality. Now a warranty of quality is not an essential element of a sale, but a collateral engagement attached to or omitted from it, at the pleasure of the parties.² The assent to the *sale* was complete; the assent to the *warranty* was given by *one* of the parties under a mistake, and this mistake might or might not give ground for other relief, but could not prevent the contract from coming into existence.

§ 70. A mistake as to the *person* with whom the contract is made, may or may not avoid the sale, according to circumstances.¹ In the common case of a trader who sells for cash,

⁴ *Dounce v. Dow*, 64 N. Y. 411; *Hight v. Bacon*, 126 Mass. 10; s. c. 30 Am. Rep. 639; *Deming v. Foster*, 42 N. H. 165; *Simcoe Agr. Soc. v. Wade*, 12 Up. Can. Q. B. 614.

¹ 8 E. & B. 816; 27 L. J. Q. B. 201; *Megaw v. Molloy*, 2 Ir. L. R. C. P. D. 530.

² *Chanter v. Hopkins*, 4 M. & W. 399; *Mondell v. Steel*, 8 M. & W. 858; *Foster v. Smith*, 18 C. B. 156.

¹ See Leake's Dig. Law of Contr. 334.

As to mistaken identity of parties purchasing. — See *ante*, Material Mistake, § 61, note 1. In *Stoddard v. Ham*, 129 Mass. 383; s. c. 37 Am. Rep. 369, the court say. that it is an elementary principle in the law governing contracts of sale that the agreement is to be ascertained exclusively from the conduct of the

it can make no possible difference to him whether the buyer be Smith or Jones, and a mistake of identity would not prevent the formation of the contract. But where the identity of the person is an important element in the sale, as if it be on credit, where the solvency of the buyer is the chief motive which influences the assent of the vendor;² or when the purchaser buys from one whom he supposes to be his debtor, and against whom he would have the right to set off the price: a mistake as to the person dealt with, prevents the contract from coming into existence for want of assent.³

parties, and the language used, when it is made as applied to the subject-matter and non-usages. That in the absence of fraud a proposal made by one party, which is accepted by another, in some kind of language intelligible to the other, this ends the negotiations and completes the contract. A party cannot escape the natural and reasonable interpretation which must be put upon what he says and does, by showing that his words were used and his acts taken with a different and undisclosed intention. *Daley v. Carney*, 117 Mass. 288; *Wright v. Willis*, 84 Mass. (2 Allen) 191; *Foster v. Ropes*, 111 Mass. 10, 16. See, also, *Hartford & N. H. R. Co. v. Jackson*, 24 Conn. 514; s. c. 63 Am. Dec. 177; *Star Glass Co. v. Longley*, 64 Ga. 576; *Phillips v. Gallant*, 62 N. Y. 256; *Schuchardt v. Allens*, 68 U. S. (1 Wall.) 359; bk. 17, L. ed. 642.

² *Ex parte Barrett*, 3 Ch. D. 123.

³ *Mistake as to identity of the person selling.* — It is a general principle that every man has a right to elect with what parties he will deal (*Winchester v. Howard*, 97 Mass. 303); for, as Lord Raymond remarks in *Humble v. Hunter*, 12 Q. B. 311, every man has a right to the benefit he contemplates from the character, credit, and substance of the person with whom he contracts. Hence where there is a misrepresentation as to the party dealt with, this will invalidate the

contract; and it seems that mistake as to identity of the party dealt with will have the same effect. Thus where an order is sent by a country merchant to a person supposed to be in business, but in consequence of a change the order was executed by another, the party sending the order will not be bound, because he had made no proposal to the party filling the order, and had a right to decide for himself with whom he would deal, (*Orcutt v. Nelson*, 67 Mass. (1 Gray) 536, 542; *Boulton v. Jones*, 2 Hurls. & N. 564); and where A. had bought ice of B., ceased to take it on account of dissatisfaction with B. and contracted for ice with C., and subsequently thereto B. bought C.'s business and delivered ice to A. under C.'s contract, without notifying him of the change, until after the delivery and consumption of the ice, it was held that B. could not maintain an action against A. for the price of the ice delivered. *Boston Ice Co. v. Potter*, 123 Mass. 28; s. c. 25 Am. Rep. 9. The court say there is no privity of contract established between plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. *Hills v. Snell*, 104 Mass. 173, 177; s. c. 6 Am. Rep. 216. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by

§ 71. In *Mitchell v. Lepage*,¹ in 1816, the defendant sought to escape liability on a purchase of thirty-eight tons of hemp, on the ground that he had not contracted with the plaintiff, but with other persons. The broker gave defendant a bought note stating the vendors to be Todd, Mitchell, and Co. It turned out that, without the broker's knowledge, that firm had been dissolved some months before by the withdrawal of two of the partners, and succeeded by the plaintiff's firm of Mitchell, Armistead, and Graabner, the last two taking the place of the withdrawn members of the old firm. Gibbs C. J. told the jury: "I agree with the defendant's counsel that he cannot be prejudiced by the substitution. . . . If by this mistake the defendant was induced to think that he had entered into a contract [*61] with *one set of men, and not with any other; and if, owing to the broker, he has been *prejudiced*, or *excluded from a set-off*, it would be a good defence." Verdict for plaintiff.

§ 72. In *Boulton v. Jones*,¹ the plaintiff had bought out the stock-in-trade and business of one Brocklehurst. The defendant, ignorant of the fact, sent to the shop a written order for goods, addressed to Brocklehurst, on the very day of the transfer to the plaintiff, and the latter supplied the goods. The goods were consumed by the defendant, he not knowing that they were supplied by the plaintiff instead of Brocklehurst. When payment of the price was afterwards demanded, the defendant refused, on the ground that he *had a set-off* against Brocklehurst, and had not contracted with the plaintiff. The Barons of the Exchequer were all of opinion that the action was not maintainable.² Pollock

B., but supposed that he received it under his contract made with C. Winchester *v. Howard*, 97 Mass. 303; Orcutt *v. Nelson*, 67 Mass. (1 Gray) 536, 542; Robinson *v. Drummond*, 2 Barn. & Ad. 303; Hardman *v. Booth*, 1 Hurls. & C. 803; Humble *v. Hunter*, 12 Q. B. 310. But if he had received notice of the change and continued to take ice as delivered, a contract

would have been implied. *Mudge v. Oliver*, 83 Mass. (1 Allen) 74; Orcutt *v. Nelson*, 67 Mass. (1 Gray) 536, 542; *Mitchell v. Lepage*, Holt N. P. 253. See, also, Clark *v. Imlay*, 12 N. J. L. (7 Halst.) 119.

¹ Holt, N. P. 253.

² 2 H. & N. 564; 27 L. J. Ex. 117.

² *Massachusetts doctrine*.—*Mudge v. Oliver*, 83 Mass. (1 Allen) 74. The

C. B. said: "The rule of law is clear, that if you propose to make a contract with A., then B. cannot substitute himself for A. without your consent and *to your disadvantage*, securing to himself all the benefit of the contract."

Martin B. said: "Where the facts prove that the defendant meant to contract with A. *alone*, B. can never force a contract upon him."⁸

Supreme Court of Massachusetts held that one who buys goods at a shop which has been occupied by a person who owes him, under the supposition that he is dealing with his debtor, but is informed before leaving the shop that another person has become the owner of the stock of goods there and is selling them on his own account, and makes no objection, but retains the goods, cannot afterwards resist an action for the price, although the vendor acquired them by a conveyance fraudulent as to the creditors of the original owner, and the purchaser was himself a creditor of such original owner. But see *Boston Ice Co. v. Potter*, 123 Mass. 28; s. c. 25 Am. Rep. 9. Leake on Contr. 334. See, also, *ante*, § 70, note 3.

⁸ In *Clark v. Imlay*, 12 N. J. L. (7 Halst.) 119, it was held that if A. enters into an agreement with B. to do a certain piece of work, and who pays B. for procuring materials and workmen for building machines (means to accomplish the object), the payment to be made to B.; and B. purchases the materials of C. in his own name upon credit, and received from A. the money to pay for them, but instead of paying for the materials appropriates the money to his own use, C. cannot maintain an action against A. to recover the value of the materials sold to B., although they came to A.'s use, because to maintain assumpsit for goods sold and delivered, proof must be made that the goods were actually sold to the defendant or delivered at his request. In *Hills v. Snell*, 104 Mass. 173; s. c. 6 Am.

Rep. 216, a warehouseman had on storage two lots of flour, one belonging to A. and the other to B. A baker ordered a certain quantity of flour from C., and C., to fill the order, bought from A. the required quantity of his flour, who took from him an order on the warehouseman for it. The warehouseman, by mistake, delivered to C. the specified quantity from B.'s flour. The baker received his flour from C. and consumed it, not knowing, supposing, or believing that it was different from that which he had ordered, and gained no benefit from the mistake. In an action brought by the warehouseman, it was held that the baker was not liable in contract for the flour, or any part of its value, nor in tort for its conversion, because where an owner has given to another, or permitted him to have control of his property, no one can be held responsible in tort for its conversion, but merely makes such use of the property, or exercises such dominion over it as is warranted by the authority given. *Burbank v. Crooker*, 73 Mass. (7 Gray) 158; s. c. 66 Am. Dec. 470; *Strickland v. Barrett*, 37 Mass. (20 Pick.) 415. In *Dalton v. Hamilton*, 1 Hannay (N. B.) 422, A., a gasfitter, working upon B.'s house, wanting certain articles, gave him a memorandum as follows: "You will require to send to C., No. 19 Union St., Boston, Mass., for the following goods for bathroom (describing the goods); (signed) A." B. gave the memorandum to D. who took it to C., and the latter, supposing it to be an order from A. his cus-

Bramwell B. said: "It is clear that if the plaintiff were at liberty to sue, it would be a *prejudice to defendant*, because it would deprive him of a set-off, which he would have had if the action had been brought by the party with whom he supposed he was dealing. *And upon that my judgment proceeds.* I do not lay it down, that because a contract was made in one person's name, another person cannot sue upon it, except in cases of agency. But when any one makes a contract in which the personality, so to speak, of the particular party contracted with is important for any reason, whether because it is to write a book, or paint a picture, or do any work of personal skill; or whether because there is a set-off due from that party, no one else is at liberty to step in and maintain that he is the party contracted with; that he has written the book, or painted the picture, or supplied the goods."

Channell B. said: "The case is not one of principal and agent; it was a contract made with B., who had transactions with the defendant and owed him money, and upon which A. seeks to sue. Without saying that the plaintiff might not have had a *right of action on an implied contract, if the goods had been in existence*, here the defendant had no notice of the plaintiff's claim until the invoice was sent to him, which was not until after he had consumed the goods, and when he could not, of course, have returned them."⁴

tomer, sent the goods together with the invoice by D. to him. A. repudiated the contract, B. gave D. the money to pay for the articles, and D. converted it to his own use, in an action brought by C. against B., for the value of the goods, the court held that C. waived the tort of D., ratified D.'s sale to B., treated D. as his agent, and that payment to D. discharged B.

⁴ See further observations on this case, *post*, Book III., Ch. 1.

See the case of *Boston Ice Co. v. Potter*, 123 Mass. 28; s. c. 25 Am. Rep. 9, which was based upon the ground of want of privity of contract (*Hills v. Snell*, 104 Mass. 173; s. c.

6 Am. Rep. 216), and want of implied contract to pay. *Winchester v. Howard*, 97 Mass. 303; *Orcutt v. Nelson*, 67 Mass. (1 Gray) 536, 542; *Hardman v. Booth*, 1 Hurls. & C. 803; *Humble v. Hunter*, 12 Q. B. 310; *Robson v. Drummond*, 2 Barn. & Ad. 303. The court say that "to entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated, no contract is to be implied. There was no privity of contract established between the plaintiff and defendant; and without such privity the possession and use of the property will not support an implied assumpsit. *Hills v.*

[In the important case of *Johnson v. Raylton*,⁵ it was held by the majority of the Court of Appeal that where goods of a particular description are ordered of a *manufacturer*, who is not otherwise a dealer in them, the contract is to be treated as a *personal* one, and is not fulfilled by the delivery of goods of the same quality as that contracted for, but made by another firm. The buyer in such a case is assumed to have contracted in reliance upon the reputation of the particular firm with whom he deals.

§ 73. The principle of *Boulton v. Jones* has been carried out to its full extent in the case of *The Boston Ice Company v. Potter*,¹ before the Supreme Court of Massachusetts, and the fact that the defendant had or had not a right of set-off against the plaintiff's claim, upon which Bramwell B. rested his judgment in *Boulton v. Jones*, was treated as immaterial.

It appeared that the defendant had previously bought ice of the plaintiffs, but, being dissatisfied with them, contracted to buy it from the Citizens' Ice Company. Subsequently the plaintiffs bought up the business of the Citizens' Company, and delivered ice to the defendant without notifying to him that they had purchased the business until after the delivery and consumption of the ice. It was held that the plaintiff company could not maintain an action for the price of the ice. It was endeavored to distinguish *Boulton v. Jones*, upon the ground that there the defendant had a set-off against *Brocklehurst*, but Endicott J. in giving judgment, said, at p. 31, referring to *Boulton v. Jones*: "The fact that a defendant in a particular case has a claim in set-off against the original contracting party, shows clearly the injustice of *forcing another person upon him to execute [*63]

Snell, 104 Mass. 173, 177. And no presumption of assent can arise from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed. A party has a right to select and

determine the person with whom he will contract, and cannot have another person thrust upon him without his consent. As he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into."

⁵ 7 Q. B. D. 438, C. A. *post*.

¹ 123 Mass. 28.

the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off, it is sufficient to state that as a reason why the defendant should prevail; but it by no means follows that, because it does not exist, the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defence to it. . . . It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company."

In *Ex parte Barnett*² the appellants had executed an order sent to them by an undischarged liquidating debtor, under the mistaken belief that they were dealing with a firm with whom they had had previous business transactions, and whose name resembled that of the liquidating debtor. Held, by the Chief Judge in Bankruptcy, that they were entitled to the goods as against the trustee in the liquidation.]

§ 74. Where a person passes himself off for another,¹ or falsely represents himself as agent for another, for whom he professes to buy,² and thus obtains the vendor's assent to

² 3 Ch. D. 123.

¹ *Hardman v. Booth*, 1 H. & C. 803; 32 L. J. Ex. 105; *Lindsay v. Cundy*, 3 App. Cas. 459, reported *sub nom.* *Cundy v. Lindsay*, S. C. 2 Q. B. D. 96, C. A.; and 1 Q. B. D. 348, *post*, chapter on *Fraud*.

The case of *Cundy v. Lindley*, L. R. 3 App. Cas. 459; s. c. *sub nom.* *Lindsay v. Cundy*, L. R. 2 Q. B. Div. 96; *Lindsay v. Cundy*, C. A.; L. R. 1 Q. B. Div. 348, follows the case of *Hardman v. Booth*, *supra*. However, where A. sells goods to B., who resells to C., A. will not be titled to maintain trover against C., merely by proving that he supposed he was selling to C., through B. as his agent, and would not have sold to B. on his own credit. See *Stoddard v. Ham*, 129 Mass. 383; s. c. 37 Am. Rep. 369.

² *Higgon v. Burton*, 26 L. J. Ex. 342.

American authorities.—*Moody v. Blake*, 117 Mass. 23; s. c. 19 Am. Rep. 394; *Dows v. Perrin*, 16 N. Y. 325; *Dean v. Yates*, 22 Ohio St. 388; *Barker v. Dinsmore*, 72 Pa. St. 427; s. c. 13 Am. Rep. 697; *Decan v. Shipper*, 35 Pa. St. 239.

False and fraudulent representations as to agency.—Where one by false and fraudulent representations that he is acting as agent for another induces the owner to enter into a contract for the sale of goods, and afterwards delivers them to a common carrier, consigned to the firm the party was supposed to represent, and such party afterwards secures the goods from the common carrier, there is no sale, and a vendee of such fraudulent pur-

a sale, and even a delivery of goods, the whole contract is void; it has never come into existence, for the vendor never assented to sell to the persons thus deceiving him. The contracts in the cases cited below were held void, on the ground of fraud, but they were equally void for mistake, or the absence of the assent necessary to bring them into existence.³

The effect of mistake in preventing the contract from coming into existence, and therefore from being enforced, is the only branch of the subject that appertains to the Formation of the Contract. The effect of mistake on the rights of the parties after the contract has been performed *or executed, will be considered, *post*, Book [*64] III., Ch. 1. *Of Mistake and Failure of Consideration.*

§ 75. The assent to a sale may be conditional as well as absolute, and then the formation of the contract is suspended till the condition is accomplished. If A. deliver his horse, on trial, to B., agreeing to take a specified price for him if B. approve him after trial, B. is merely bailee until the condition is accomplished, his assent to become purchaser not having been given when he obtained possession of the horse.¹ Cases of sales "on trial," or of goods "to arrive" by a particular vessel, and the bargains known as "sale or return"² are all instances where the assent is conditional. Most of the reported cases, however, have arisen out of disputes as to the *performance* of the conditions, instead of the *formation* of the contract, and the subject can be more intelligibly treated as a whole. The reader is therefore referred to Ch. 1, of Book IV., Part I., *post*.

chaser will acquire no title. *Dean v. Yates*, 22 Ohio St. 388, 395. Thus a distinction is to be made between those cases where there was and was not a delivery to the fraudulent vendee.

³ *Barker v. Dinsmore*, 62 Bp. St. 427; s. c. 13 Am. Rep. 697; *Decan v. Shipper*, 35 Pa. St. 239; *Moody v. Blake*, 117 Mass. 23; *Dows v. Perrin*, 16 N. Y. 325; *Dean v. Yates*, 22 Ohio St. 388.

¹ See *Hunt v. Wyman*, 100 Mass. 198.

² For instances of which, see *Moss v. Sweet*, 16 Q. B. 493; *Ex parte Wingfield*, in re Florence, 10 Ch. D. 591 C. A., where it was held that goods sent to a person "on sale or return" do not pass on his bankruptcy under the reputed ownership clause.

CIVIL LAW.

§ 76. The principles of the common law upon the subject embraced in this chapter do not in general differ from those recognized in America and in countries governed by the civil law.

There is, however, one striking exception. The civil law permits what are termed *quasi-contracts*, and enforces obligations resulting from them. The *negotiorum-gestor*, the man who voluntarily assumed to take charge of another's business in his absence, or who, without authority of law, took under his control the person and property of an infant, was held entitled to rights as well as responsible for the obligations resulting from his unauthorized interference. If he spent money usefully in the business thus assumed, he was entitled to recover it back. If he furnished supplies, he was entitled to charge the price as though a contract of sale had intervened. If he paid a debt, he took the creditor's place.

[*65] The *quasi-contract*, in a word, produced the * effect of creating obligations *ultra citroque*, in the language of the civilians. These principles of the Roman law still prevail unimpaired over Continental Europe, and are found expressly sanctioned in the French Civil Code, articles 1570-1575. Pothier says that they are founded on natural equity, and bind even infants and insane persons who are incapable of consent. If, in France, a man should repair his absent neighbor's enclosure,¹ or furnish food to his cattle, without request, he could maintain an action on the *quasi-contract* implied by the law there. At common law, it need hardly be said that no such action would lie. The count for money paid by the plaintiff for the defendant must aver a request by the defendant, and this request, express or implied, must be proven.² The principle in our law is invariable that no liability can be established against a man by the mere volun-

¹ Pothier, Obl. §§ 114-15.

² But now, under the new Rules of Pleading, a simple averment of the request will only suffice where there has been an express request made by

the defendant. Where the request is to be implied from the facts and circumstances of the case, those facts and circumstances, so far as material, must be set forth. R. S. C. 1875,

tary payment or expenditure of money in his behalf by a third person; that no man can become the creditor of another without the latter's knowledge or assent. It is of course otherwise where the payment is under compulsion or in discharge of a liability imposed on the party paying.⁸

§ 77. The text of the Institutes laying down the principles of the Roman law on this point, was not an innovation but a condensation of the numerous texts of the pre-existing law. "Igitur cum quis absentis negotia gesserit, ultro citroque inter eos nascuntur actiones quæ appellantur negotiorum gestorum. Sed domino quidem rei gestæ adversus eum qui gessit, *directa* competit actio, negotiorum autem gestori, *contraria*. Quas ex nullo contractu proprie * nasci manifestum est, quippe ita nascuntur [*66] istæ actiones, si *sine mandato* quisque alienis negotiis gerendis se obtulerit; ex quâ causâ, ii duorum negotia gesta fuerint, *etiam ignorantes* obligantur." The equity of the law is then stated as follows: "Idque utilitatis causa receptum est, ne absentium qui subita festinatione coacti, nulli demandata negotiorum suorum administratione, peregre profecti essent, desererentur negotia, quia sane nemo curaturus esset, si de eo quod quis impendisset, nullam habiturus esset actionem."¹ Our action for money had and received to recover back what has been paid by mistake, is one of those that the Roman lawyers considered as arising *quasi-ex contractu*. "Item is cui quis per errorem non debitum solvit, quasi ex contractu debere videtur."² This action was termed *condictio indebiti*. "Is quoque qui non debitum accepit ab eo qui per errorem solvit, re obligatur; daturque agenti contra eum propter repetitionem, condictitia actio."³

Order XIX. rules 4, 27, and see Bullen & Leake, Prec. of Plead. ed. 1882, p. 279.

⁸ Stokes v. Lewis, 1 T. R. 20; Child v. Morley, 8 T. R. 610; Lord Gallo-way v. Matthew, 10 East, 264; Durnford v. Messiter, 5 M. & S. 446; 1 Wms. Saund. 356, note on Osborne v.

Rogers; England v. Marston, L. R. 1 C. P. 529; 35 L. J. C. P. 259. And see a very singular case, Johnson v. Royal Mail Steam Packet Co., L. R. 3 C. P. 38.

¹ Inst. lib. 3, tit. 27, § 1.

² Inst. 3. 27. 6.

³ Inst. 3. 14. 1.

AMERICAN LAW.

§ 78. In the text-books in America, there has been a singular and almost unanimous attack upon the authority of *Cooke v. Oxley*,¹ and Professor Bell, in his "Inquiries into the Contract of Sale," also disapproves it, as contrary to the principles of the civil law and of the law of Scotland.² This is the more remarkable, as it is hardly contested that the decisions accord, in the United States at least, with the principles established in the English Courts.

Mr. Story, in his *Treatise on Sales*,³ while citing the American authorities,⁴ which are perfectly in accord with the English law on this point, concurs with Professor Bell in the opinion that the rule in *Cooke v. Oxley*⁵ is unjust and inequitable. In his strictures on the decision, he denies that the grant of time to accept the offer is made without [*67] * consideration. He suggests, as one sufficient legal consideration, the expectation or hope that the offer will be accepted. This appears to be more fanciful than serious. The hope of A. that his offer will be accepted if he gives B. time to consider it, is not a consideration moving from B. to A., but is the spontaneous emotion of A. arising out of his own act; for in the case supposed, B. is bound to nothing, does nothing, gives nothing, promises nothing to raise this hope. The second consideration suggested by Mr. Story is, that "the making of such an offer might betray the other party into a loss of time and money by inducing him to make examination, and to inquire into the value of the goods offered; and this inconvenience assumed by him is a sufficient consideration for the offer." This argument assumes as a fact the exact reverse of the facts alleged in the declaration. It takes for granted that "an inconvenience is *assumed*" by the party to whom the offer is made; and it is precisely on the absence of this consideration that the decision was put, Buller J. saying: "In order to sustain a promise,

¹ 3 T. R. 653.

² Bell's Inq. 27.

³ Story on Sales, § 127.

⁴ *Eskridge v. Glover*, 5 Stew. &

Port. (Ala.) 264; *Faulkner v. Heberd*,

26 Vt. 452; *Beckwith v. Cheever*, 1

Foster (N. H.) 41.

⁵ 3 T. R. 653.

there must be *either a damage to the plaintiff*, or an advantage to the defendant, but here was neither."

§ 79. In Kent's Commentaries it is said in the note to p. 478 (12th edition), that the "criticisms which have been made upon the case of *Cooke v. Oxley*¹ are sufficient to destroy its authority." Mr. Duer, in his Treatise on Insurance,² goes still further and says that *Cooke v. Oxley* decides "that when a bargain has been proposed, and a certain time for closing it has been allowed, there is no contract even when the offer has not been withdrawn, and has been accepted within the limited period; to constitute a valid agreement, there must be proof that the party making the offer assented to its terms after it was accepted."³ If this were indeed the decision, nothing could be more surprising than to find it upheld as sound law by a series of eminent English judges. But *Cooke v. Oxley* has been totally *mis- [*68]

¹ "Both parties must be bound in order to make the contract binding upon either, unless time is given by one to the other, in which case, perhaps, he may be bound, although the other is not; at least we should think this reasonable in mercantile contracts, though it was decided otherwise in the case of *Cooke v. Oxley*, 3 T. R. 653."

Cooke v. Oxley is said in *Hallock v. Commercial Ins. Co.*, 26 N. J. L. (2 Dutch.) 268, 282, to have been effectually overruled by the English courts. This, however, is a mistake, as it seems merely to have been considered in *Adams v. Lindsell*, 1 Barn. & Ald. 681; and discussed in *Stevenson v. McLean*, L. R. 5 Q. B. Div. 346; s. c. 49 L. J. Q. B. 701; 42 L. T. 897; 28 W. R. 916, without having been directly overruled, and for that reason is still to be regarded as good law in England. In the case of *Boston & M. R. R. v. Bartlett*, 57 Mass. (3 Cush.) 224, 228, the court say: "The case of *Cooke v. Oxley*, 3 T. R. 653, in which a different doctrine was held, has occasioned con-

siderable discussion, and in one or two instances has probably influenced the decisions. That case has been supposed to be inaccurately reported; and that in fact there was in that case no acceptance. But however that may be, if the case has not been directly overruled, it has certainly, in later cases, been entirely disregarded, and cannot now be considered as of any authority." In *McCulloch v. Eagle Ins. Co.*, 18 Mass. (1 Pick.) 278, 281, the court say: "Both parties must be bound in order to make the contract binding upon either, unless time is given by one to the other, in which case, perhaps, he may be bound, although the other is not; at least we should think this reasonable in mercantile contracts, though it was decided otherwise in the case of *Cooke v. Oxley*, 3 T. R. 653." In this case *Cooke v. Oxley* is fully commented upon and criticised.

² Vol. i. p. 118.

³ A similar construction to *Cooke v. Oxley* is given in *Leake on Contr.* p. 21.

apprehended by those who have thus criticised it, and there is nothing to warrant the suggestion that it is misreported, or that Bayley J. stated it to be misreported in the observations made by him in *Humphries v. Carvalho*.⁴ It is difficult to see how the case *could* be misreported, for it was a motion in arrest of judgment, which presents the question exactly as on a general demurrer,⁵ and was decided on the ground that the declaration, which is copied in the report, showed no cause of action. An examination of it shows that the plaintiff alleged—First, an offer by the defendant to sell at a certain price; Second, a promise to leave the offer open till four o'clock, *if plaintiff would agree to purchase, and would give notice to the defendant before the hour of four o'clock*; Third, that the plaintiff did agree, and did give notice *before four o'clock*. There was *no allegation that the defendant actually left the offer open till four o'clock, but only that he promised to do so*. The plaintiff's action was tested by the Court on two theories—First, that it was for a breach of promise to leave the offer open; or, secondly, that it was for a breach of a contract, that became complete by the plaintiff's acceptance of an offer that had actually remained open. On the first theory it was held that the declaration was insufficient, because it alleged no consideration for the *promise*. On the second theory, it was held that the declaration was insufficient, because it did not *allege* that the defendant had actually left the offer open for acceptance as he had promised. The Court did not decide that the contract would not have been completed if the offer, *remaining open*, had been accepted; but that nothing showed that the offer was open when accepted. Lord Kenyon C. J. construed the declaration as proceeding on the first theory, that is, breach of promise to keep the offer open, and he said that this promise was *nudum pactum*. Buller J. took both grounds, saying that the promise in the morning was without consideration; and that it was *not stated* that the defendant agreed afterwards, or even that the goods were

[*69] kept; in other words, that the * plaintiff had not

⁴ 16 East, 45.

⁵ *Collins v. Gibbs*, 2 Burr. 899; *Bowdell v. Parsons*, 10 East, 359.

alleged a binding legal promise in the morning, nor a complete contract in the afternoon; and Grose J. also said that the defendant was not bound before four o'clock, and *it is not stated* that they came to a subsequent agreement.

That this was really the decision is shown by what was said by Mr. Justice Bayley in *Humphries v. Carvalho*,⁶ which is strangely construed by Mr. Duer into an assertion that *Cooke v. Oxley* was misreported. This is the language: "The question in *Cooke v. Oxley* arose upon the record, and a writ of error was afterwards brought upon the judgment of this Court, by which it appears that the objection made was, that there was only a proposal of sale by the one party, and *no allegation* that the other party had acceded to the contract of sale."

§ 80. Both the learned American authors, Mr. Story and Mr. Duer, refer to *Adams v. Lindsell*,¹ as overruling *Cooke v. Oxley*, the latter writer saying that "its authority is directly overthrown" by *Adams v. Lindsell*. Certainly the King's Bench did not in this last case say a word in disparagement of *Cooke v. Oxley*; and when this very point was urged by counsel in *Routledge v. Grant*,² Best C. J. pointed out that there was no conflict between the cases, for *Adams v. Lindsell* proceeded expressly on the ground that a treaty by correspondence through the post rested on exceptional principles, because the separation of the parties prevented assent at the same instant, and *ex necessitate rei*, some point of time must be fixed when the contract should be considered complete; for otherwise, the interchange of letters would go on *ad infinitum*. The Court was therefore driven to determine either that no contract was possible by correspondence between distant parties, or to fix some point at which the contract became perfect. The rule adopted was in entire accordance with sound principle, and declared that the offer by letter was a continuing offer in contemplation of law until it reached the other party, so that when an
*answer of acceptance was placed in the post, ad- [*70]
dressed to the party making the offer, the *aggregatio*

⁶ 16 East, 45.

¹ 1 B. & Ald. 681.

² 4 Bing. 653.

mentium, the mutual assent was complete. But in *Cooke v. Oxley*, it did not appear that this mutual assent ever took place. There was no *continuing offer* till four o'clock, but only a *promise* to continue it, not binding for want of consideration. The Court held that Oxley had a right to retract, up to the moment when Cooke announced his assent to the offer. So the Court would no doubt have held in *Adams v. Lindsell*, that the latter had a right to retract up to the moment when Adams accepted; but Lindsell's withdrawal of his offer, and resale of the wool, occurred *after acceptance*, though he was ignorant of the fact of acceptance. In a word, Oxley withdrew his offer *before acceptance*, Lindsell *after acceptance*, and the contract was held incomplete in the former case and complete in the latter, both decisions being consistent applications of one and the same principle, namely, that a contract becomes complete only when the mutual assent of the parties concurs at the *same moment of time*; and that no number of *alternate* offers and withdrawals, refusals and acceptances, can ever suffice to conclude a bargain.

To these remarks may be added the fact that in 1829 the King's Bench decided *Head v. Diggon*,³ on the authority of *Cooke v. Oxley*, without any intimation that it had been overruled, and in accordance with the point really decided in that case. (And see *ante*, p. 45.)

§ 81. In an American case¹ the principle under discussion received a further illustration. The defendant wrote an offer to carry for the plaintiffs "not exceeding 6000 tons gross, in and during the months of April, May, June, July, and August, 1864, upon the terms and for the price hereinafter specified," and on the next day the plaintiffs answered, "We assent to your agreement and will be bound by its terms." Held to be no binding contract, because the plaintiffs were not bound to furnish anything for carriage; that the [*71] offer * was a mere promise of an *option* to them, for which promise no consideration was given, and that

³ 3 M. & R. 97.

¹ *Chicago and Great Eastern Railway Co. v. Dana*, 43 N. Y. (4 Hand)

240; and see *Great Northern Railway Co. v. Witham*, L. R. 9 C. P. 16, *ante*, p. 47.

the defendant had the right to withdraw from his offer at any time before such an acceptance as imposed *some* obligation on the company as a consideration; the acceptance would have been good, if the company had agreed to furnish *any* specified quantity not exceeding the 6000 tons, but not otherwise, because the defendant could not be bound while the plaintiffs were left free.

§ 82. On the questions of the mode of completing a bargain by correspondence, the American authorities are not only in accordance with the decisions of our own courts, but they have gone further, and covered the point left undecided in *Adams v. Lindsell*, though included in the *dicta*.¹

In *Mactier's Adm's v. Frith*,² the Court of Errors of New York decided, after a full review of the authorities, that where the dealing is by correspondence, "the acceptance of a written offer of a contract of sale consummates the bargain, *provided the offer is standing at the time of the acceptance*."

The point was still left open as to the effect of a revocation of the offer not communicated to the party accepting at the time of acceptance.

§ 83. In the more recent case of *Tayloe v. Merchants' Fire Insurance Company*¹ the Supreme Court of the United States has closed this last point in America, by holding that under such circumstances, "an offer prescribing the terms of insurance is intended and is to be deemed a valid undertaking by

¹ *Falls v. Gaither*, 9 Port. (Ala.) 613; *Averill v. Hedge*, 12 Conn. 436; *Bryant v. Booze*, 55 Ga. 438; *Levy v. Cohen*, 4 Ga. 1; *Macclay v. Harvey*, 90 Ill. 525; s. c. 32 Am. Rep. 35; *Chiles v. Nelson*, 7 Dana (Ky.) 282; *Hutcheson v. Blakeman*, 3 Met. (Ky.) 80; *Abbott v. Shepard*, 48 N. H. 14; *Batterman v. Morford*, 76 N. Y. 622; *Trevor v. Wood*, 36 N. Y. 307; *Myers v. Smith*, 48 Barb. (N. Y.) 614; *Clark v. Dales*, 20 Barb. (N. Y.) 42; *Vassar v. Camp*, 14 Barb. (N. Y.) 342; s. c. 11 N. Y. 441; *Brisban v. Boyd*, 4 Paige Ch. (N. Y.) 17; *Hallock v. Commercial Ins. Co.*, 26 N.

J. L. (2 Dutch.) 268; *Potts v. Whitehead*, 20 N. J. Eq. (5 C. E. Gr.) 55; s. c. 23 N. J. Eq. (8 C. E. Gr.) 512; *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339; *The Palo Alto, Davies* (2 Ware) C. C. 343; *In re Imperial Land Co. of Marseilles, Townsend's Case*, L. R. 13 Eq. 148; *Hebb's Case*, L. R. 4 Eq. 9; *Stocken v. Collin*, 7 Mees. & W. 515.

² 6 Wendell (N. Y.) 104; *Batterman v. Morford*, 76 N. Y. 622.

¹ 50 U. S. (9 How.) 390; bk. 13, L. ed. 187; approved by *Lindley J.* in *Byrne v. Van Tienhoven*, 5 C. P. D. 344, 347.

the company that they will be bound according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and *that it cannot be withdrawn unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.*"

Although this decision was given on an insurance contract, the reasoning of the court was quite applicable to all [*72] other bargains between parties. Nelson J. * who delivered the opinion, said: "On the acceptance of the terms proposed, transmitted in due course of mail to the company, the minds of both parties have met on the subject, *in the mode contemplated at the time of entering upon the negotiation*, and the contract becomes complete. The party to whom the proposal is addressed, has a right to regard it as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected. Such is the plain import of the offer. And besides, upon any other view, the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be in turn proposed by the applicant to the company for *their* approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows of course that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance. It is apparent, therefore, that such an interpretation of the acts of the parties would *defeat the object which both had in view in entering upon the correspondence.* . . .

"The fallacy of the opposite argument, in our judgment consists in the assumption that the contract cannot be consummated without a *knowledge* on the part of the company that the offer has been accepted. . . . But a little reflection will show that in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. . . . The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor for the same reason can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence. The accept-

ance must succeed the offer after the lapse of *some* interval of time, and if the process is to be carried further, in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from one party to the other."²

§ 84. The civilians do not accord with these views. Pothier *says: "If I write to a merchant of Leghorn [*73] a letter, in which I propose to purchase of him a certain quantity of merchandise at a certain price, and before my letter can have reached him I write a second letter with-

² The case of *Tayloe v. Merchants' Fire Ins. Co.*, of Baltimore, cited in the text, has been referred to as authority as to when contracts by correspondence are completed. *Utley v. Donaldson*, 94 U. S. (4 Otto) 45; bk. 24, L. ed. 24, 54; In re Dodge, 17 Bank Reg. 506; s. c. 9 Ben. C. C. 482; *Winterport Granite & Co. v. The Jasper*, 1 Holmes, C. C. 102; *Northern Mut. Life Ins. Co. v. Elliott*, 7 Sawy. C. C. 17, 21; s. c. 5 Fed. Rep. 229. In *Utley v. Donaldson*, 94 U. S. (4 Otto) 45; bk. 24, L. ed. 24, 54, it was held that telegraphic despatches may constitute a complete contract. This was a case where the defendants made a proposition by telegraph to sell bonds, which proposition was accepted by telegraph; after sending their despatch the defendants wrote a letter, in which they qualified the proposition sent by telegraph. The court held that the defendant sold the bonds absolutely by the despatch, and that if they intended to qualify it they should have done so in the despatch.

In *McCulloch v. Eagle Ins. Co.*, 18 Mass. (1 Pick.) 278, 281, the plaintiff wrote by mail to the defendants inquiring on what terms they would insure his vessel. On the 1st of January the defendant wrote that they would insure at a certain rate. On the 2d they wrote another letter retracting their offer made in the

first letter; the plaintiff, before he received the last letter, put into the post-office an answer to the defendant's first letter, accepting the terms proposed. The court held that there was no contract. But the great weight of authority hold in accordance with *Tayloe v. Merchants' Fire Ins. Co.*, that the contract is consummated and becomes binding on despatching the letter of acceptance, where not otherwise specified in the offer. See *Falls v. Gaither*, 9 Port. (Ala.) 605; *Averill v. Hedge*, 12 Conn. 424, 436; *Levy v. Cohen*, 4 Ga. 1; *Chiles v. Nelson*, 7 Dana (Ky.) 281; *Thayer v. Middlesex Mut. Ins. Co.*, 28 Mass. (10 Pick.) 326; s. c. 1 Duer, Mar. Ins. 68, 121, 127, 129; *Beckwith v. Cheever*, 21 N. H. (1 Fost.) 41; *Brisban v. Boyd*, 4 Paige, Ch. (N. Y.) 20; *Mactier v. Frith*, 6 Wend. (N. Y.) 104; s. c. 21 Am. Dec. 262; *Hamilton v. Lycoming Ins. Co.*, 5 Pa. St. 339; *Eliason v. Henshaw*, 17 U. S. (4 Wheat.) 225; bk. 4, L. ed. 556; *Adams v. Lindsell*, 1 Barn. & Ald. 601; *Eyles v. Ellis*, 4 Bing. 112; *Routledge v. Grant*, 3 Carr. & P. 267; *Duncan v. Topham*, 3 C. B. 225; *Humphries v. Carvalho*, 16 East, 45; *Kufh v. Weston*, 3 Esp. 54; *Potter v. Sanders*, 6 Hare, 1; *Dunlop v. Higgins*, 12 Jur. 295; s. c. 1 H. L. Cas. 381; *Head v. Diggon*, 3 Man. & R. 97; *Stocken v. Collin*, 7 Mees. & W. 515; *Cooke v. Oxley*, 3 T. R. 653.

drawing my proposal, although the merchant of Leghorn, in ignorance of the change of my intentions, answers that he accepts the proposed bargain, yet there is no contract of sale between us; for my intention not having continued until the time at which my letter was received, and my proposal accepted, the assent or concurrence of our wills necessary to form a contract of sale has not occurred. It must be observed, however, that if my letter causes the merchant to be at any expense in proceeding to execute the contract proposed, or if it occasion him any loss, as, for example, if in the intermediate time between the receipt of my first and that of my second letter, the price of the merchandise falls, and my first letter has made him miss the opportunity to sell it before the fall of the price; in all these cases I am bound to indemnify him, unless I prefer to agree to the bargain as proposed by my first letter. This obligation results from that rule of equity that no person shall suffer for the act of another: *Nemo ex alterius facto prægravari debet*. I ought, therefore, to indemnify him for the expense and loss which I occasion by making him a proposition which I afterwards refused to execute. For the same reason, if the merchant, on the receipt of my first letter, and before receiving the second, which contains a revocation of it, ships for my account and forwards the merchandise, though in that case there has not properly been a contract of sale between us, yet he will have a right to compel me to execute the proposed contract, not in virtue of any contract of sale, but of my obligation to indemnify him, which results from the rule of equity above mentioned.¹

§ 85. It is impossible to read the reasoning of this eminent jurist in the passages just cited, without feeling that it fails to meet the difficulties of the case. He [*74] places the proposer in the *instances suggested under all, and more than all, the obligations of a purchaser, while insisting that he has made no purchase. The ground suggested, that it is the act of the proposer

¹ Pothier, *Contrat de Vente*, No. 32, and see the judgment of Lindley C. P. D. 344, where Pothier's opinion is stated not to be in accordance with J. in *Byrne v. Tienhoven*, L. R. 5 English law.

which causes damage to the other, and thus imposes an equitable obligation to repair that damage, is a *petitio principii*. *Ex hypothesi*, the party receiving the offer knows that it may legally be retracted by a second letter despatched to him before his acceptance, and he accepts subject to this risk. If, therefore, before waiting the time necessary to learn whether the offer had been actually retracted at the date of his acceptance, he incurs expense or loss in a premature attempt to execute a non-existent contract, surely it is his own precipitancy, and not his correspondent's conduct, which is the real cause of the damage. So, too, if there be a fall in the market, on what ground is he entitled to make his correspondent suffer the loss, when plainly in the contrary event the profit would accrue to himself? To make a mere negotiation not resulting in a bargain operate so as to place the proposer *in duriori casu* than he would be if bound by a perfect contract; to render him liable for a fall in the market without the correlative chance of profit from a rise, is a proceeding which fails to awaken a response from that sense of equity to which Pothier appeals; and notwithstanding the imposing authority of his name, it may be doubted whether the doctrine thus propounded would stand the test of discussion at the bar of a tribunal governed even by the civil law.¹

§ 86. Both the common and the civil law, however, concur in relation to the case where an order for purchase or sale is transmitted by correspondence to an *agent* of the writer. If A., in Liverpool, order his correspondent, B., in New York, to purchase a cargo of flour for account of A., and B. execute the order before receiving a countermand, A. remains bound, even though he may have posted the countermand before the execution of the order. The civil law is express on this point: "*Si mandassem tibi ut fundum emereres, postea scripsissem *ne emereres, tu [*75] antequam scias me vetuisse, emisisses, mandati tibi obligatus ero, ne damno afficiatur is qui mandatum suscepit.*"

¹ Mr. Story is of a contrary opinion, and lauds this doctrine as "by far the fairest and most intelligible rule that can be found." § 180, note.

Dig. L. 17, tit. 1, § 15. The contract here is one of agency, not of sale, and is governed by totally different principles; for in agencies, a revocation of authority by the principal cannot take effect till it reaches the agent.¹

§ 87. But although this is a different contract, the analogy is very strong between it and a bargain and sale by correspondence. If A. send an agent to B. with a proposal for sale, even the civilians admit that A. cannot revoke the authority of the agent to make the offer until the revocation reaches him. So that if A. despatched C. with an order recalling the authority, even before the agent had made the offer, A. would still remain bound by a bargain made before C.'s arrival with the countermand. Why should there be any difference when the proposer sends his proposal by the public post, which he authorizes to deliver it? A., by sending a letter from London, addressed to B. in Manchester,

¹ Story on Agency, § 470 (9th ed.). Per Bayley J. in *Salte v. Field*, 5 T. R. 215; *Kerr v. Lefferly*, 7 Grant (Ont.) 412.

As to revocation of agency.— See *ante*, Revocation.

Revocation of authority of agent.— The revocation of an agent's authority becomes operative as to the agent, from the time it is actually made known to him; if the revocation is by letter, it becomes operative from the time the letter is received, and not from the date when it was mailed. *Robertson v. Cloud*, 47 Miss. 208. As to third person, the revocation of the agency takes effect from the date when it is made known to them; until made known it is inoperative, and his acts will bind both the principal and himself. See *Fellows v. Hartford & N. Y. Savings Boat Co.*, 38 Conn. 197; *Beard v. Kirk*, 11 N. H. 397; *Davis v. Lane*, 10 N. H. 160; See, also, *Morgan v. Stell*, 5 Binn. (Pa.) 395; *Bowerbank v. Morris*, 1 Wall. C. C. 119; *Anon. v. Harrison*, 12 Mod. 346; *Hazard v. Treadwell*, 1 Str. 507. As to revocation by death

of the principal, see *ante*, "Revocation of Agency."

Revocation of agency by the death of the principal operates instantly at common law. See *Campbell v. Anderson*, 4 Bligh, 513; *Watson v. King*, 4 Campb. 272; *Smart v. Sanders*, 5 C. B. 896, 917; s. c. 57 Eng. C. L. 916; *Webb v. Kirby*, 7 De G. M. & G. 378; *Jaques v. Worthington*, 7 Up. Can. Ch. (Grant) 192, 196; *Bayley v. Collett*, 18 Ves. 179; *Shipman v. Thompson*, Willes, 103. By the civil law and the French law, however, a sale by factor or an agent, after the death of the principal, but before notice, is binding. Dig. Lib. 17, tit. 1, l. 26, sec. 1; *ib.* Lib. 17, tit. 1, l. 58; *Pothier, Traite du Contract de Charge*, no. 168; *Code civil des Français*, no. 2008; and this is true, although the act was appointed to be done after the death of the principal. See *Wallace v. Cook*, 5 Esp. N. P. C. 117; *Snaith v. Mingay*, 1 Maule & S. 87; *Robey v. Twelves*, Stiles, 424; *Salte v. Field*, 5 T. R. 211; *Wynne v. Thomas*, Willes, 506.

really gives to the public post authority to hand to B. a written offer, and to receive an answer in behalf of A. Even on the doctrines of the civil law, it would seem to be permissible under such circumstance to hold that A.'s revocation comes too late, if it only arrives after the completion of the bargain thus authorized to be made in his behalf. In reality the true theory of the case seems to be that an offer sent by mail is an authority to the party to whom it is sent to bind the *sender by acceptance, and includes an [*76] implied promise that no revocation is to take effect till received by the agent.

§ 88. The cases that arise in attempts to contract by correspondence present at times very singular complexity. In *Dunmore v. Alexander*, the party to whom the proposal was made wrote and posted a letter of acceptance; and then wrote and posted a letter recalling the acceptance, and *both letters reached the proposer at the same time*. The majority of the Court of Sessions in Scotland held that there was no contract, reversing the judgment of the lower Court; and a very similar case is cited by Merlin, *Repert. tit. Vente, sec. 1, art. 3, no. 11*, where an offer was sent by letter to buy goods on certain conditions. The offer was accepted by letter, but by a subsequent letter the unconditional acceptance was recalled, the writer proposing some modifications in the conditions. Both letters reached the original proposer together, and he declined to execute the contract. It was held that the proposer could not be forced to perform the bargain, the second answer to his proposal authorizing him to consider the acceptance as withdrawn.¹

§ 89. In the case of *McCulloch v. The Eagle Insurance Company*,¹ A. wrote to ask B. on what terms he would insure

¹ 9 Shaw & Dunlop, 190. See *ante*, p. 53. See *Finucane's Case*, 17 W. R. 813; In re *Constantinople & Alexandria Hotels Co.*, *Reidpath's Case*, L. R. 11 Eq. 80.

¹ *Massachusetts doctrine*.—The Supreme Court of New Jersey say in *Hallock v. Commercial Ins. Co.*, 26

N. J. L. (2 Dutch.) 268, 283, that *McCulloch v. Eagle Ins. Co.* "is against the whole current of authority, both in England and this country," but it is intimated in *Lewis v. Browning*, 130 Mass. 175, that the doctrine laid down in that case will be followed in Massachusetts whenever a case

a vessel. B. wrote on the 1st of January that he would insure at a specified rate, and on the 2d of January wrote a letter retracting his offer. A. had written an acceptance of the offer before receiving the second letter, *but after B. had posted the second letter*, and it was held that there was no contract; but this case is disapproved by the American text-writers, and is in conflict with the decision of the Supreme Court of the United States in *Taylor v. Merchants' Fire Insurance Company*, cited *ante*, p. 71.

arises for its application. A contrary doctrine prevails in England. See *Byrne v. Van Tienhoven*, L. R. 5 C. P. Div. 344; *Stevenson v. McLean*, L. R. 5 Q. B. Div. 346.

Mailing a letter, it would seem, is generally recognized as such an overt act as closes the contract and binds the parties. See *Kentucky Mut. Ins. Co. v. Jenks*, 5 Ind. 96; *Hallock v. Commercial Ins. Co.*, 26 N. J. L. (2

Dutch.) 268; *Vassar v. Camp*, 14 Barb. (N. Y.) 341; *Mactier v. Frith*, 6 Wend. (N. Y.) 118; s. c. 21 Am. Dec. 262; *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339; *Taylor v. Merchants' Fire Ins. Co.*, 50 U. S. (9 How.) 390, 400; bk. 13, L. ed. 187, 191; *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Duncan v. Topham*, 8 C. B. 225; *Dunlop v. Higgins*, 1 H. L. C. 381; *Potter v. Saunders*, 6 Hare Ch. 1.

* CHAPTER IV.

[*77]

OF THE THING SOLD..

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§ 90. As there can be no sale without a thing transferred to the purchaser in consideration of the price received, it follows, that if at the time of the contract the thing *has ceased to exist*, the sale is void.¹

¹ *Accidental destruction of the thing sold.* — Where a contract is made for the sale or delivery of a specified article of personal property, under circumstances that the title does not vest in the vendee if the property is destroyed by accident without the fault of the vendor, so that delivery becomes impossible, the latter is not liable to the vendee in damages for the non-delivery. *Dexter v. Norton*, 47 N. Y. 62, 64; s. c. 7 Am. Rep. 415; *Harmony v. Bingham*, 12 N. Y. 99; s. c. 62 Am. Rep. 142; *Taylor v. Caldwell*, 3 Best & S. 826; s. c. 113 Eng. C. L. 826; *Rugg v. Minett*, 11 East, 210; *Clark v. Glasgow Assurance Co.*, 1 McQ. H. L. Cas. 668. Thus where A. agreed with B. to give him the use of a music hall on certain specified days, for the purpose of holding concerts, with no express stipulation, for the event of the destruction of the music hall by fire or otherwise, and it was destroyed before the time arrived, it was held that both parties were excused from the performance of the contract. *Taylor v. Caldwell*, 3 Best & S. 826; s. c. 113 Eng. C. L.

824; 32 L. J. C. L. 164; 8 L. T. 356; 11 W. R. 726. In *Young v. Bruce*, it was held that where a person hires a slave, and guarantees for his return at the end of a year, if the slave, without any fault of the hirer, dies within that time, he will be excused from his return. See *Harris v. Nichols*, 5 Munf. (Va.) 483. And where property taken by force or by right of reprieve, as a living animal, and there was a judgment of *retorno habendo* in an action on the reprieve, bound for breach of this condition, it was held a good plea in bar, that before the judgment in the reprieve suit, the animal died, without the fault of the plaintiff in such suit. *School District No. 1 v. Dauchy*, 25 Conn. 530; s. c. 68 Am. Dec. 371; *School Trustee of Trenton v. Bennett*, 27 N. J. L. (3 Dutch.) 514; *People v. Manning*, 8 Cow. (N. Y.) 297; s. c. 18 Am. Dec. 451; *Carpenter v. Stevens*, 12 Wend. (N. Y.) 589. The court held that an act of God will excuse the non-performance of a duty created by law, but not of one created by contract. In a case where

In *Strickland v. Turner*,² a sale was made of an annuity dependent upon a life. It was afterwards ascertained that the life had already expired at the date of the contract, and not only was the sale held void, but *assumpsit* by the purchaser to recover back the price paid as money had and received was maintained.

In *Hastie v. Couturier*,³ a cargo of corn, loaded on a vessel not yet arrived, was sold on the 15th of May. It was afterwards discovered that the corn having become heated had been discharged by the master at an intermediate port, and sold on the 21st of the preceding month of April: *held*, that the sale of the 15th of May was properly repudiated by the purchaser.

§ 91. These cases are sometimes treated in the decisions as dependent on an implied warranty by the vendor of the existence of the thing sold: and sometimes on the [*78] want of *consideration for the purchaser's agree-

A. had undertaken to erect a school-house, and have it completed by the 1st of May, and on the 27th of April it was struck by lightning and burned down; he was held liable in damages for the non-performance of the contract. This was a hardship, but in accordance with that general rule, that where a person absolutely contracts to do a certain thing not impossible or unlawful at the time, he will not be excused from the obligation of the contract, unless the performance is prevented by the other party, or made unlawful by statutory enactment, in such case, neither inevitable accident, nor those events termed acts of God, will excuse him, for the reason that he might have provided against it by his contract. See *Adams v. Nichols*, 36 Mass. (19 Pick.) 275; s. c. 31 Am. Dec. 137; *Dexter v. Norton*, 47 N. Y. 62, 64; s. c. 7 Am. Rep. 415; *Tompkins v. Dudley*, 25 N. Y. 272; *Harmony v. Bingham*, 12 N. Y. 99, 102; s. c. 62 Am. Dec. 142; *Beebe v. Johnson*, 19 Wend. (N. Y.) 500; s. c. 32 Am. Dec. 518; *Hand v. Baynes*,

4 Whart. (Pa.) 204; s. c. 33 Am. Dec. 54; *Paradine v. Jane*, Aleyn, 27; *Shubrick v. Salmond*, 3 Burr. 1637; *Hadley v. Clarke*, 8 T. R. 259.

But it is not essential to the ownership of personal property and the consequent right of its disposition that the owner should have manual possession of the property at the time of sale; because a manual transfer is not requisite to a sale of personal property at common law [*vide ante*, p. 3, § 1, note 4]; the only essentials, aside from the requirements of the Statute of Frauds, being mutual assent of parties, an object, and a price, either in money or other property. *Nance v. Metcalf*, 1 Mo. App. 183; s. c. 1 West. Rep. 441; *vide ante*, p. 3, § 1, note 3.

² 7 Ex. 208. See, also, *Cochrane v. Willis*, 1 Ch. 58; 35 L. J. Ch. 36; *Smith v. Myers*, L. R. 5 Q. B. 429; 7 Q. B. 139, in error.

³ 9 Ex. 102, and 5 H. L. C. 673, reversing the judgment in 8 Ex. 40. See, also, *Barr v. Gibson*, 3 M. & W. 390.

ment to pay the price. Another, and perhaps the true ground, is rather that there has been no contract at all, for the assent of the parties being founded on a mutual mistake of fact, was really no assent, there was no subject-matter for a contract, and the contract was therefore never completed.¹ This was the principle applied by Lord Kenyon in a case where the leasehold interest which the buyer agreed to purchase, turned out to be for six years instead of eight and a half, and where he held the contract void, as founded on a mistake in the thing sold, the buyer never having agreed to purchase a less term than offered by the vendor.² This is also the opinion of the civilians. Pothier³ says that: "There must be a thing sold, which forms the subject of the contract. If then, ignorant of the death of my horse, I sell it, there is no sale for want of a thing sold. For the same reason, if when we are together in Paris, I sell you my house at Orleans, both being ignorant that it has been wholly, or in great part, burnt down, the contract is null because the house, which was the subject of it, did not exist: the site and what is left of the house are not the subject of our bargain, but only the remainder of it." And the French Civil Code, art. 1109, is in these words, "There is no valid assent, where assent has been *given by mistake*, extorted by violence, or surprised by fraud."

§ 92. In relation to things *not yet in existence*, or not yet belonging to the vendor, the law considers them as divided into two classes, one of which may be *sold*, while the other can only be the subject of an *agreement to sell*, of an executory contract. Things not yet existing which may be sold, are those which are said to have a *potential existence*, that is, things which are the natural product or expected increase of something already belonging to the vendor.¹ A man may

¹ Rice v. Dwight Manuf. Co., 56 Mass. (2 Cush.) 80, 86; Thompson v. Gould, 37 Mass. (20 Pick.) 139; Allen v. Hammond, 36 U. S. (11 Pet.) 63; bk. 9, L. ed. 633; Hitchcock v. Giddings, 4 Price, 135; Farrar v. Nightingale, 2 Esp. 639.

² Farrar v. Nightingale, 2 Esp. 139.

³ Contrat de Vente, No. 4.

¹ See Heald v. Builders' Ins. Co., 111 Mass. 33; Lewis v. Lyman, 39 Mass. (22 Pick.) 437, 442, 443; Smith v. Atkins, 18 Vt. 461.

In ventre sa mere. — A valid sale may be made of the wine a vineyard is expected to produce and grain a

sell the crop of hay to be grown on his field,² the wool to be clipped from his sheep at a future time, the milk that

field is expected to grow, and milk the cow may yield, for the future young born of an animal. *Screws v. Roach*, 22 Ala. 672; *Hull v. Hull*, 48 Conn. 250, 256; s. c. 40 Am. Rep. 165; *Sawyer v. Gerrish*, 70 Me. 254; s. c. 35 Am. Rep. 323; *Pettis v. Kellogg*, 61 Mass. (7 Cush.) 456; *Walker v. Russell*, 34 Mass. (17 Pick.) 280; *Glover v. Austin*, 23 Mass. (6 Pick.) 209; *Butterfield v. Baker*, 22 Mass. (5 Pick.) 522; *Bigelow v. Wilson*, 18 Mass. (1 Pick.) 498; *Carter v. Jarvis*, 9 Johns. (N. Y.) 143; *Fonville v. Casey*, 1 Murph. (N. C.) 389; s. c. 4 Am. Dec. 559; *McCarty v. Blevins*, 5 Yerg. (Tenn.) 195; s. c. 26 Am. Dec. 262; *Smith v. Atkins*, 18 Vt. 461; *Fowler v. Merrill*, 52 U. S. (11 How.) 375; bk. 13, L. ed. 736; *Mitchell v. Winslow*, 2 Story C. C. 638; *Lealie v. Guthrie*, 1 Bing. N. C. 697; *Couturier v. Hastie*, 16 Eng. L. & Eq. 562; *Strickland v. Turner*, 14 Eng. L. & Eq. 471; *Congreve v. Everetts*, 10 Ex. 298; s. c. 26 Eng. L. & Eq. 493; *Langton v. Horton*, 1 Hare, 549; *Grantham v. Hawley*, Hob. 132; *Curtis v. Amber*, 1 Jac. & W. 526; *Wood v. Foster*, 1 Leon. 42; *Robinson v. McDonell*, 5 Maule & S. 226; 2 Kent Com. 468. But a mere contingent possibility not coupled with an interest is not subject of sale. *Mitchel v. Winslow*, 2 Story C. C. 630, 638; *Lunn v. Thornton*, 1 C. B. 379; *Langton v. Horton*, 1 Hare, 549, 556; *Grantham v. Hawley*, Hob. 132; *Belding v. Read*, 3 Hurl. & C. 955, 961; *Robinson v. McDonell*, 5 Maule & S. 229; *Carleton v. Leighton*, 3 Meriv. 687.

² A man may sell a crop of grain to be delivered in the future, although the crop has not as yet been planted, provided he owns or has leased the ground wherein it is to be planted. See *Hurst v. Bell*, 72 Ala. 336; *Wilkinson v. Ketler*, 69 Ala. 435; *Arques*

v. Wasson, 51 Cal. 620; *Stephens v. Tucker*, 55 Ga. 543; *Gittings v. Nelson*, 86 Ill. 591; *Sanborn v. Benedict*, 78 Ill. 309; *Hansen v. Dennison*, 7 Ill. App. 73; *Hendrick v. Brattain*, 63 Ind. 438; *Heald v. Builders' Ins. Co.*, 111 Mass. 38; *Rowlings v. Hunt*, 9 N. C. 270; *Cotten v. Willoughby*, 83 N. C. 75; *Andrew v. Newcomb*, 32 N. Y. 417; *Conderman v. Smith*, 41 Barb. (N. Y.) 404; *Van Hoozer v. Cory*, 34 Barb. (N. Y.) 19; *Parker v. Jacobs*, 14 S. C. 112; *Moore v. Byrum*, 10 S. C. 452; *Watkins v. Wyatt*, 9 Baxt. (Tenn.) 250; *Bellows v. Wells*, 36 Vt. 59; *Smith v. Atkins*, 18 Vt. 461; *Butt v. Ellett*, 86 U. S. (19 Wall.) 544; bk. 22, L. ed. 183. But see *Collier v. Faulk*, 69 Ala. 58; *Reed v. Burrus*, 58 Ga. 574; *Gittings v. Nelson*, 86 Ill. 591; *Hutchinson v. Ford*, 9 Bush (Ky.) 318; *Milliman v. Neher*, 20 Barb. (N. Y.) 38; *Comstock v. Scales*, 7 Wis. 159.

Thus in *Conderman v. Smith*, 41 Barb. (N. Y.) 404, a mortgage of butter and cheese "to be made this season" was held to be valid, the mortgagor being the owner of the cows from which the butter and cheese is to be made at the time the mortgage is executed. The owner of land may contract for its cultivation and provide that the title to the crops raised shall vest in himself. *Andrew v. Newcomb*, 32 N. Y. 417. See *Touner v. Hills*, 48 N. Y. 662; *Von Hooyer v. Cory*, 34 Barb. 9. And in *Heald v. Builders' Mut. Fire Ins. Co.*, 111 Mass. 38, where the tenant agreed not to sell the hay, but to feed it all on the farm, the contract was sustained and the tenant held to have no title to the hay. In *Gitting v. Nelson*, 86 Ill. 591, however, where a tenant agreed, before a crop was planted, to give the landlords a lien upon it for the rent of their property, the contract was held invalid.

his cows will yield *in the coming month,³ and the [*79] sale is valid.⁴ But he can only make a *valid agreement to sell, not an actual sale*, where the subject of the con-

³ 14 Viner's Ab. tit. Grant, p. 50; Shep. Touch. Grant. 241; Perk. § 65, 90; Grantham v. Hawley, Hob. 132; Wood and Foster's Case, 1 Leon. 42; Robinson v. Macdonnell, 5 M. & S. 228; see Sanborn v. Benedict, 78 Ill. 309.

⁴ See Low v. Pew, 108 Mass. 350; s. c. 11 Am. Rep. 357.

An assignment of goods at sea is valid and passes title to their proceeds. Hodges v. Harris, 23 Mass. (6 Pick.) 360. See Gardner v. Howland, 19 Mass. (2 Pick.) 599; Bedlam v. Tucker, 18 Mass. (1 Pick.) 389; De Wolf v. Harris, 4 Mason C. C. 515; Howland v. Harris, 4 Mason C. C. 497; Brown v. Heathcote, 1 Atk. 160; Lempriere v. Pasley, 2 T. R. 485; Caldwell v. Ball, 1 T. R. 205. The court say: "The transfer of an invoice of an outward bound cargo, after the sailing of the vessel operates upon the proceeds, so as to make them the property of the purchaser." The sale of an outward bound vessel or cargo passes title to the proceeds, whether they be money or goods. Pratt v. Parkham, 41 Mass. (24 Pick.) 42; Hodges v. Harris, 23 Mass. (6 Pick.) 360; Gardner v. Howland, 19 Mass. (2 Pick.) 599; Bedlam v. Tucker, 18 Mass. (1 Pick.) 389; Lamb v. Durant, 12 Mass. 54; s. c. 7 Am. Dec. 31; Putnam v. Dutch, 8 Mass. 287. In several cases the court have gone so far as to hold that where it is not in the power of the vendor to deliver a bill of sale or a bill of lading or an invoice of goods at sea, the property will pass without it, provided proper exertion be used to make the earliest practicable delivery. Pratt v. Parkham, 41 Mass. (24 Pick.) 42, 47; Gardner v. Howland, 19 Mass. (2 Pick.) 599; Buffington v. Curtis, 15 Mass. 528; s. c. 8 Am. Dec. 115; Brown v. Heathcote,

1 Atk. 160; Wright v. Campbell, 4 Burr, 2046, 2051; Lempriere v. Pasley, 2 T. R. 485.

Lease of property.—Where a lessee put furniture and fixtures into the leased premises under an agreement with the lessor that they should become the property of the lessor at the expiration of the lease, and during the term the lessor gave a bill of sale on his interest in them to a third person, it was held that the lessor's right in them passed to such third person by the bill of sale, and that he could maintain an action for their conversion after the expiration of the lease. Thrall v. Hill, 110 Mass. 328; Day v. Bassett, 102 Mass. 445. In Thrall v. Hill the court say that the lessor "had a vested interest which would ripen into a perfect title by the lapse of time. It is true that a man cannot sell personal property in which he has no interest. A mere possibility, coupled with no interest, is not the subject of sale, and would not pass by a bill of sale. But if he has a present interest in the property sold, a sale of it is valid."

Mortgage of stock of goods in a store to secure debts maturing at a future day, and not only including what was in the store at the time, but all goods which should be added from day to day during the existence of the mortgage; purchases which were put into the store to replace that part of the stock which should be displaced, or to increase the part of the stock which was on hand was *per se* void. Hamilton v. Rogers, 8 Md. 316; Phelps v. Murray, 2 Tenn. Ch. 746; s. c. 4 Cent. L. J. 583. See Head v. Goodwin, 37 Me. 181; Wilson v. Wilson, 37 Md. 111; s. c. 11 Am. Rep. 518; Low v. Pew, 108 Mass. 147; s. c. 11 Am. Rep. 357; Rice v. Stone, 83 Mass. (1 Allen) 566; Pettis v. Kel-

tract is something to be afterward acquired,⁵ as the wool of any sheep, or the milk of any cows that he may buy within the year, or any goods to which he may obtain title within the next six months.⁶ This distinction involves very impor-

logg, 61 Mass. (7 Cush.) 456; Jones v. Richardson, 51 Mass. (10 Metc.) 481; Ford v. Williams, 18 N. Y. 583; s. c. 67 Am. Dec. 83; Egdell v. Hart, 9 N. Y. 213; Griswold v. Sheldon, 4 N. Y. 581; Van Hoozer v. Cory, 34 Barb. (N. Y.) 9; Collins v. Myers, 16 Ohio, 547; Tennessee Nat. Bank v. Ebbert, 9 Heisk. (Tenn.) 153; s. c. 2 South. L. Rev. 172; Bellows v. Wells, 36 Vt. 599; Robinson v. Elliott, 89 U. S. (22 Wall.) 513; bk. 22, L. ed. 758; Pennock v. Coe, 64 U. S. (23 How.) 117; bk. 16, L. ed. 472; Waddington v. Bristow, 2 Bos. & Pul. 452; Holroyd v. Marshall, 2 De G. F. & J. 596; Langton v. Horton, 1 Hare, 549; Emmerson v. Heelis, 2 Taunt. 38; *Contra*, Hickman v. Perrin, 6 Cold. (Tenn.) 135; Gay v. Bidwell, 7 Mich. 519; Martin v. Oliver, 9 Humph. (Tenn.) 565; s. c. 49 Am. Dec. 717.

⁵ *Per* Mansfield C. J. in Reed v. Blades, 5 Taunt. 212, 222. See, also, Thrall v. Hill, 110 Mass. 330; Low v. Pew, 108 Mass. 350; s. c. 11 Am. Rep. 357.

⁶ Noyes v. Jenkins, 55 Ga. 586; Whitehead v. Root, 2 Met. (Ky.) 584; Head v. Goodwin, 37 Me. 181; Wilson v. Wilson, 37 Md. 1; s. c. 11 Am. Rep. 518.

Sale or mortgage of goods to be acquired by the mortgagor is void at law as against subsequent attaching creditors. Gittings v. Nelson, 86 Ill. 591; Emerson v. European, &c. Ry. Co., 67 Me. 387; Head v. Goodwin, 37 Me. 182; Hamilton v. Rogers, 8 Md. 310; Rice v. Stone, 83 Mass. (1 Allen) 589; Moody v. Wright, 54 Mass. (13 Metc.) 17; s. c. 46 Am. Dec. 706; Jones v. Richardson, 51 Mass. (10 Metc.) 481; Looker v. Peckwell, 38 N. J. L. (9 Vr.) 253; s. c. 39 N. J. L. (10 Vr.) 184; McCaffrey

v. Woodin, 65 N. Y. 439; Cressy v. Sabre, 17 Hun (N. Y.) 120; Williams v. Briggs, 11 R. I. 476; Cummings v. Morgan, 12 Up. Can. Q. B. 565.

⁶ *Massachusetts doctrine.*—It was held by the Supreme Court of Massachusetts in the case of Chesley v. Josselyn, 73 Mass. (7 Gray) 489, that a mortgage of chattels cannot convey property of which the mortgagor is not the owner, at the time of the conveyance, whatever may be the agreement between the parties; and that the mortgage cannot bind property subsequently acquired without some further act of assurance or ratification (Codman v. Freeman, 57 Mass. (3 Cush.) 306; Barnard v. Eaton, 56 Mass. (2 Cush.) 303; Jones v. Richardson, 51 Mass. (10 Metc.) 481; Winslow v. Merchants' Ins. Co., 45 Mass. (4 Metc.) 307; s. c. 38 Am. Dec. 368; Otis v. Still, 8 Barb. (N. Y.) 102; Bank of Lansingburgh v. Crary, 1 Barb. (N. Y.) 542, 551; Chapman v. Weimer, 4 Ohio St. 481; Williams v. Briggs, 11 R. I. 476; s. c. 23 Am. Rep. 518); but that excepting a sale of a stock of chattels, containing covenants of title, and the right to sell "subject to" a certain mortgage, does not estop the vendee to claim, as against the mortgagee, chattels added to the stock of the mortgagor as soon as mortgaged although the mortgage purports to include such chattels. In Codman v. Freeman, 57 Mass. (3 Cush.) 306, it was held that a stipulation, in a mortgage of personal property, that property subsequently purchased by the mortgagor shall be subject to the same lien, and that the mortgagor will execute a new mortgage thereof, is an executory agreement, which,

tant consequences, as will be pointed out hereafter. (Book II.) For the present it suffices to say, that in an actual sale,

until it is executed by a new mortgage, does not bind after-acquired property; nor does it vitiate the mortgage as to property, to which it attached at the time of its execution. See, also, *Barnard v. Eaton*, 56 Mass. (2 Cush.) 294; *Jones v. Richardson*, 51 Mass. (10 Metc.) 481; *Winslow v. Merchants' Ins. Co.*, 45 Mass. (4 Metc.) 806; s. c. 37 Am. Dec. 368; *Briggs v. Parkman*, 43 Mass. (2 Metc.) 258; s. c. 57 Am. Dec. 89; *Marden v. Babcock*, 43 Mass. (2 Metc.) 99.

The same rule prevails in Maine. See *Chapin v. Cram*, 40 Me. 561; *Head v. Goodwin*, 37 Me. 181. In Maryland, *Hamilton v. Rogers*, 8 Md. 301; see, also, *Preston v. Leighton*, 6 Md. 98; *Hudson v. Warner*, 2 Har. & G. (Md.) 415. In New York, *Gardner v. McEwen*, 19 N. Y. 123; see, also, *Van Husen v. Radcliff*, 17 N. Y. 580; s. c. 72 Am. Dec. 480; *Edgell v. Hart*, 9 N. Y. 213; s. c. 69 Am. Dec. 532. And in Wisconsin, *Hunter v. Bosworth*, 43 Wis. 583; *Mowry v. White*, 21 Wis. 417; *Single v. Phelps*, 20 Wis. 398; *Farmers' Loan & Trust Co. v. Commercial Bank*, 11 Wis. 207; *Chynoweth v. Tenney*, 10 Wis. 397; *Comstock v. Scales*, 7 Wis. 159. Same doctrine prevails in England. See *Lunn v. Thornton*, 1 C. B. 379; s. c. 50 Eng. C. L. 379.

Rule when grantee takes possession. — Although a mortgage of personal property to be subsequently acquired is in itself ineffectual to vest in the mortgagee a legal title to the property, yet if after acquisition by the mortgagor, the mortgagee, by delivery from or by consent of such mortgagor, takes possession of the property under the mortgage conveyance, the title to the property, both in law and equity, vests in the mortgagee without further conveyance or bill of sale.

Bryan v. Smith, 22 Ala. 534; *Walker v. Vaughn*, 33 Conn. 577; *Rowan v. Sharp's Rifle Manuf. Co.*, 29 Conn. 282; *Titus v. Mabee*, 25 Ill. 257; *Hunt v. Bullock*, 23 Ill. 320; *Chapin v. Cram*, 40 Me. 561; *Hamilton v. Rogers*, 8 Md. 301; *Chase v. Denny*, 130 Mass. 566; *Henshaw v. Bank of Bellows Falls*, 76 Mass. (10 Gray) 568; *Chesley v. Josselyn*, 73 Mass. (7 Gray) 489; *Mitchell v. Black*, 72 Mass. (6 Gray) 100; *Codman v. Freeman*, 57 Mass. (3 Cush.) 306; *Barnard v. Eaton*, 56 Mass. (2 Cush.) 294; *Moody v. Wright*, 54 Mass. (13 Metc.) 17; s. c. 46 Am. Dec. 706; *Rowley v. Rice*, 52 Mass. (11 Metc.) 333; *Jones v. Richardson*, 51 Mass. (10 Metc.) 481; *Carrington v. Smith*, 25 Mass. (8 Pick.) 419; *McCaffrey v. Woodin*, 65 N. Y. 459; s. c. 22 Am. Rep. 614; *Milliman v. Neher*, 20 Barb. (N. Y.) 37; *Otis v. Sill*, 8 Barb. (N. Y.) 102; *Chapman v. Weimer*, 4 Ohio St. 481; *Cook v. Corthell*, 11 R. I. 482; s. c. 23 Am. Rep. 518; *Williams v. Briggs*, 11 R. I. 476; s. c. 23 Am. Rep. 518; *Single v. Phelps*, 20 Wis. 398; *Farmers' L. & T. Co. v. Commercial Bank*, 11 Wis. 207; *Chynoweth v. Tenney*, 10 Wis. 397; *Baker v. Gray*, 14 C. B. 462; *Chidell v. Galsworthy*, 6 C. B. N. S. 470; *Lunn v. Thornton*, 1 C. B. 379; s. c. 50 Eng. C. L. 379; *Hope v. Hayley*, 5 L. & Bl. 830; s. c. 34 Eng. L. & Eq. 189; *Congreve v. Evetts*, 10 Ex. 298; s. c. 26 Eng. L. & Eq. 493; *Langton v. Horton*, 1 Hare, 549; *Carr v. Allatt*, 3 Hurls. & N. 964; *Robinson v. Macdonell*, 5 Maule & S. 228; *Gale v. Burnell*, 7 Q. B. 850. Thus it was held in *Rowan v. Sharp's Rifle Manuf. Co.*, *supra*, that where a mortgage of a factory and its implements embraced in its terms such machinery and stock as should be afterwards purchased and placed upon the premises, and the mortgagee had after-

the property passes, and the risk of loss is in the purchaser, while in the agreement to sell, or executory contract, the risk remains in the vendor.

§ 93. The leading modern case on the subject is *Lunn v. Thornton*,¹ decided in 1845. The action was *trover* for bread, flour, &c. The plaintiff, in consideration of a sum lent to him, had by deed-poll covenanted that he "sold and delivered unto the defendant all and singular his goods, household furniture, &c., then remaining and being, or which

wards taken possession of the factory, with such subsequently acquired property, that whatever effect was to be given to the operation in itself had become operative upon possession being taken by the mortgagee. And where the lease of a farm contained a clause giving the lessor "a lien as security for the payment of the rent aforesaid on all goods, implements, stock, fixtures, tools, and other personal property, which may be put on said premises, and said lien to be enforced on non-payment of the rent" by taking and sale as in case of a chattel mortgage. In an action for the recovery of hay, and the farm produce and stock on the farm, taken and sold by an agent of the lessor for default and payment of rent, the court held that an action could not be maintained; that the clause was in substance a chattel mortgage, which was against the lessee, so far as had purported to create a lien upon property not in existence or not then acquired, while in law it passed no title, yet it gave the lessor a license to seize such property, and after such seizure the title passed; that in equity it transferred the beneficial interest, without the intervention of any new act, which attached immediately upon coming into existence or the acquisition of the property. *McCaffrey v. Woodin*, 65 N. Y. 459; s. c. 22 Am. Dec. 644.

There are cases in equity which hold that such a mortgage is effectual to charge the property, when ac-

quired, with an equitable lien or to create an equitable lien in it in favor of the mortgagee against the mortgagor, and some even hold as against attaching creditors, especially where they have actual notice of the mortgage. *Sillers v. Lester*, 48 Miss. 513; *Smithurst v. Edmunds*, 14 N. J. Eq. (1 McCar.) 408; *Seymour v. Canandaigua & N. F. R. R. Co.*, 25 Barb. (N. Y.) 284; *Tedford v. Wilson*, 3 Head (Tenn.) 311; *Williams v. Briggs*, 11 R. I. 476; s. c. 23 Am. Rep. 518; *Butt v. Ellett*, 86 U. S. (19 Wall.) 544; bk. 22, L. ed. 183; *United States v. New Orleans R. R. Co.*, 79 U. S. (12 Wall.) 362; bk. 20, L. ed. 434; *Galveston R. R. Co. v. Cowdry*, 78 U. S. (11 Wall.) 459; bk. 20, L. ed. 199; *Pennock v. Coe*, 64 U. S. (23 How.) 117; bk. 16, L. ed. 472. *Holroyd v. Marshall*, 10 H. L. Cas. 191; and *Mitchell v. Winslow*, 2 Story C. C. 630. But the doctrine of the latter case is said in *Chynoweth v. Tenney*, 10 Wis. 397, 403, to be denied in subsequent cases.

Maine doctrine. — It is said in Maine that as between the mortgagor and the mortgagee, the title to the subsequent acquired goods will vest in the mortgagee as soon as the goods are acquired. *Deering v. Cobb*, 74 Me. 332; s. c. 43 Am. Rep. 596; 27 Alb. L. J. 377; *Allen v. Goodnow*, 71 Me. 420. And the same doctrine is maintained in *Ludwig v. Kipp*, 20 Hun (N. Y.) 265.

¹ 1 C. B. 379.

should at any time thereafter remain and be in his dwelling-house, &c." Tindal C. J. in delivering the opinion of the Court, said, "It is not a question whether a deed might not have been so framed as to have given the defendant a *power of seizing* the future personal goods of the plaintiff, as they should be acquired by him, and brought on the premises, in satisfaction of the debt, but the question arises before us on a plea which puts in issue the *property* in the goods, and nothing else: and it amounts to this whether by law a deed of bargain and sale of goods can *pass the property* in goods which are not in existence, or, at all events, which are not belonging to the grantor at the time of executing the deed." *Held* in the negative. Subsequent cases are to the same effect.²

² *Gale v. Burnell*, 7 Q. B. 850; *Congreve v. Evetts*, 10 Ex. 298, and 23 L. J. Ex. 273; *Hope v. Hayley*, 5 E. & B. 830, and 25 L. J. Q. B. 155; *Chidell v. Gallsworthy*, 6 C. B. N. S. 471; *Allatt v. Carr*, 27 L. J. Ex. 385. See, also, *Moakes v. Nicholson*, 34 L. J. C. P. 273; 19 C. B. N. S. 290.

The English doctrine has been generally, though not universally, adopted by the American courts. See *Noyes v. Jenkins*, 55 Ga. 586; *Thrall v. Hill*, 110 Mass. 328; *Low v. Pew*, 108 Mass. 350; s. c. 11 Am. Rep. 357; *Rice v. Stone*, 83 Mass. (1 Allen) 586; *Henshaw v. Bank of Bellows Falls*, 76 Mass. (10 Gray) 571; *Codman v. Freeman*, 57 Mass. (3 Cush.) 306; *Barnard v. Eaton*, 56 Mass. (2 Cush.) 294; *Moody v. Wright*, 54 Mass. (13 Metc.) 17; *Jones v. Richardson*, 51 Mass. (10 Metc.) 481; *Winslow v. Merchants' Ins. Co.*, 45 Mass. (4 Metc.) 306; s. c. 38 Am. Dec. 368; *Pierce v. Emery*, 32 N. H. 484; *Pennock v. Coe*, 64 U. S. (23 How.) 117; bk. 16, L. ed. 472; *Phelps v. Murray*, 2 Tenn. Ch. 746; s. c. 4 Cent. L. J. 583.

In *Alabama* it is held that if a thing has no existence, there is no subject of sale, grant, or mortgage, but that things not actually existing, but having a potential existence, may

be the subject of a sale, grant, or mortgage. And that a crop, although immature, it is said, and whatever of labor may be required for its cultivation to maturity and its severance from the soil, is subject of a sale or mortgage. See *Booker v. Jones*, 55 Ala. 266; *McKenzie v. Lampley*, 31 Ala. 528; *Evans v. Lamar*, 21 Ala. 333; *Robinson v. Mauldin*, 11 Ala. 977; *Adams v. Tanner*, 5 Ala. 740; *Huntington v. Chisholm*, 61 Ga. 270.

In *Arkansas*, where a mortgage is executed upon an unplanted crop, or lien attaches in equity, as soon as the subject of the mortgage comes into existence and in proceedings to foreclose, will be enforced against the mortgagor and those holding under him with record notice. *Apperson v. Moore*, 30 Ark. 56; s. c. 21 Am. Rep. 170.

In *California*, where a lessee of land in possession executes a mortgage of the crops to be raised by him during the coming season, and which are not yet planted, the mortgage is valid. *Arques v. Wasson*, 51 Cal. 620; s. c. 21 Am. Rep. 718.

In *Georgia*, it is held that there can be no valid sale or mortgage of a crop until it is planted. *Redd v. Burrus*, 58 Ga. 574; *Stephens v. Tucker*, 55 Ga. 543. But where the

[*80] § 94. *But though the actual *sale* is void, the agreement will take effect if the vendor, by some act done after his acquisition of the goods, clearly shows his

seed is planted and growing, the mortgage will be valid. *Stephens v. Tucker*, 55 Ga. 543.

In Illinois, property to be acquired after the execution of a mortgage is subject to the mortgage lien, if the deed is properly executed, acknowledged, and recorded, and possession is taken of the property before any other lien is attached. *Gregg v. Sanford*, 24 Ill. 17.

In Indiana, a mortgage executed by a tenant on crops to be raised by him upon a tract of land leased by him, is valid as against his execution creditors, but they may sell the equity of redemption. *Headrick v. Brattain*, 63 Ind. 438. See *Chissom v. Hawkins*, 11 Ind. 316.

In Iowa, a mortgage of after-acquired property will pass a good title against all persons having notice. *Bradley v. Gelkinson*, 57 Iowa, 300; *Stephens v. Pence*, 56 Iowa, 257; *Brown v. Allen*, 35 Iowa, 306, 310; *Scharfenburg v. Bishop*, 35 Iowa, 60.

In Kentucky, it is held in *Hutchinson v. Ford*, 9 Bush. (Ky.) 318; s. c. 15 Am. Rep. 711, that a mortgage of a crop to be raised on a farm during a certain term, but which crop is not yet sown, passes no title, and the mortgagee has no claim against a purchaser of the crop, for it or its value. Citing *Redd v. Burrus*, 58 Ga. 574 (1877); *Ross v. Wilson*, 7 Bush. (Ky.) 29; *Barnard v. Eaton*, 56 Mass. (2 Cush.) 295; *Everman v. Robb*, 52 Miss. 653; s. c. 3 Cent. L. J. 735; *Otis v. Sill*, 8 Barb. (N. Y.) 111; *Bank of Lansingburgh v. Cary*, 1 Barb. (N. Y.) 542; *Comstock v. Scales*, 7 Wis. 159; *Lunn v. Thornton*, 1 C. B. 379; s. c. 50 Eng. C. L. 379. But see *Forman v. Proctor*, 9 B. Mon. (Ky.) 124. The court say, "Many other authorities might be cited to the same effect, and quite as

many that look in the other direction." *Jones v. Webster*, 48 Ala. 109; *Robarts v. Church*, 17 Conn. 144; *Galena & C. U. R. R. v. Menzies*, 26 Ill. 121; *Tripp v. Brownell*, 56 Mass. (2 Cush.) 376; *Root v. Bancroft*, 51 Mass. (10 Metc.) 48; *Gardner v. Hoeg*, 35 Mass. (18 Pick.) 168; *Haven v. Foster*, 31 Mass. (14 Pick.) 497; *Pierce v. Emery*, 32 N. H. 484; *Andrew v. Newcomb*, 32 N. Y. 417; *Smith v. Atkins*, 18 Vt. 465; *Pierce v. Milwaukee & St. P. R. R. Co.*, 24 Wis. 551; *Butt v. Ellett*, 86 U. S. (19 Wall.) 544; bk. 22, L. ed. 183; *Brett v. Carter*, 2 Low. C. C. 458; s. c. 3 Cent. L. J. 286; *Holroyd v. Marshall*, 10 H. L. Cas. 191.

In Maine and Massachusetts, where power is given to seize after-acquired property and the mortgagee takes it into his possession, he will protect it against execution creditors and persons acquiring the property subsequent to his seizure. *Deering v. Cobb*, 74 Me. 332; s. c. 43 Am. Rep. 596; 27 Alb. L. J. 377; *Allen v. Goodnow*, 71 Me. 420; *Chapin v. Cram*, 40 Me. 561; *Head v. Goodwin*, 37 Me. 181; *Chase v. Denny*, 130 Mass. 566; *Mitchell v. Black*, 72 Mass. (8 Gray) 100; *Moody v. Wright*, 54 Mass. (13 Metc.) 17; s. c. 46 Am. Dec. 706; *Rowley v. Rice*, 52 Mass. (11 Metc.) 333; *Carrington v. Smith*, 25 Mass. (8 Pick.) 419; *Chase v. Denny*, 130 Mass. 566.

In Michigan, a chattel mortgage on a stock of goods may be made to recover goods afterwards put in to keep up the stock; but they must be brought within those descriptive words, and a mortgage drawn to recover goods to be "added to" the stock or gotten "for use" in the business will not include goods bargained for, but never received at the place of business, or which, being received,

intention of giving effect to the original agreement, or if the vendee obtains possession under authority to seize them. This modification of the rule is recognized in the cases just

was devoted to some other business. *Curtis v. Wilcox*, 49 Mich. 425; *Cadwell v. Pray*, 41 Mich. 307; *American Cigar Co. v. Foster*, 36 Mich. 388; *People v. Bristol*, 35 Mich. 28.

In Mississippi, a mortgage of property to be acquired, a lien attaches as soon as such property comes into the mortgagor's possession, and will be good as against a subsequent mortgage made on the same property after it was acquired, especially where the subsequent mortgagee had notice of a prior mortgage. *Sillers v. Lister*, 48 Miss. 513.

In New York, a mortgage of goods to be acquired is void. *Brown v. Combs*, 63 N. Y. 598; *Gardner v. McEwen*, 19 N. Y. 123; *Edgell v. Hart*, 9 N. Y. 213; s. c. 59 Am. Dec. 532; *Conderman v. Smith*, 41 Barb. (N. Y.) 404; *Milliman v. Neher*, 20 Barb. (N. Y.) 37; *Otis v. Sill*, 8 Barb. (N. Y.) 111; *Farmers' Loan & T. Co. v. Long Beach Improvement Co.*, 27 Hun (N. Y.) 89; *Cressey v. Sabre*, 17 Hun (N. Y.) 120; *Mittnacht v. Kelley*, 3 Keyes (N. Y.) 407; *Spies v. Boyd*, 1 E. D. Smith (N. Y.) 445. Yet a valid chattel mortgage may be made upon the future products of a property in which the mortgagor has an interest. *Conderan v. Smith*, 41 Barb. (N. Y.) 404; *Van Hoozer v. Cory*, 34 Barb. (N. Y.) 9. See *Gittings v. Nelson*, 86 Ill. 591; *Wilson v. Wilson*, 37 Md. 1; s. c. 11 Am. Rep. 518; *Pettis v. Kellogg*, 61 Mass. (7 Cush.) 456; *Cotten v. Willoughby*, 83 N. C. 75; s. c. 35 Am. Rep. 564; *Pierce v. Emery*, 32 N. H. 484; *Collins v. Myers*, 16 Ohio, 547; *Bellows v. Wells*, 36 Vt. 599; *Robinson v. Elliott*, 89 U. S. (22 Wall.) 513; bk. 22, L. ed. 758; *Holroyd v. Marshall*, 2 De G. F. & J. (Am. ed.) 596, note (1). Thus there may be a grant of the cheese expected to be made from

cows of which the grantor is then the owner. *Van Hoozer v. Cory*, 34 Barb. (N. Y.) 12. And a mortgage of crops to be sown vests potentially over the time of the executory bargain, and actually as soon as the subject arises. *Andrew v. Newcomb*, 32 N. Y. 417; *Conderman v. Smith*, 41 Barb. (N. Y.) 404.

In North Carolina, a mortgage of a growing crop is valid. *Cotten v. Willoughby*, 83 N. C. 75; s. c. 35 Am. Rep. 564. See *Robinson v. Ezsell*, 72 N. C. 231.

In Rhode Island, a mortgage of personal property to be subsequently acquired, conveyance in the title to such property, when acquired, is valid at law against the mortgagor, or his voluntary assignee, unless after acquisition possession of such property is given to the mortgagee and taken by him under the mortgage. *Cook v. Corthell*, 11 R. I. 482; s. c. 23 Am. Rep. 518; *Williams v. Briggs*, 11 R. I. 476; s. c. 23 Am. Rep. 518.

In South Carolina, a mortgage of personal property, which the mortgagor has no possession or right of possession, and which is not the natural product of property of which he has possession or right of possession, is invalid against antecedent creditors, subsequently obtaining judgment and levying upon the same before delivery. *Parker v. Jacobs*, 14 S. C. 112; s. c. 37 Am. Rep. 724. See *Boyd v. Satterwhite*, 10 S. C. 45.

In Tennessee, a mortgage by the owner of land upon a crop yet to be planted is valid against an execution creditor. *Watkins v. Wyatt*, 9 Baxt. (Tenn.) 250; s. c. 30 Am. Rep. 63, note; 16 Alb. L. J. 205; *McCarty v. Blevins*, 5 Yerg. (Tenn.) 195; s. c. 26 Am. Dec. 262. However, in *Phelps v. Murray*, 2 Tenn. Ch. 746, it was held that a mortgage made to secure

cited, and rests originally on the authority of the fourteenth rule in Bacon's Maxims: "*Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortitur effectum, interveniente novo actu.*"¹

See *Brown v. Bateman* (L. R. 2 C. P. 272), where the bargain was in relation to such materials as might be subsequently brought upon the premises under a building contract.

§ 95. It is well to observe that in equity a different rule prevails on this subject; and that a contract for the sale of chattels to be afterwards acquired, transfers the beneficial interest in the chattels, as soon as they are acquired, to the vendee.¹ The whole doctrine with its incidents, both at

debts maturing at a future day, which conveys a stock of goods, and any other goods which may be purchased by the grantors to replace any part of said stock which may have been disposed of, or to increase and enlarge the stock now on hand, is *per se* void; the distinction undoubtedly being that in the first case the mortgagor has a potential interest; in the second case he has not. See, also, *Tennessee Nat. Bank v. Ebbert*, 9 Heisk. (Tenn.) 153; s. c. 2 South. Law Rev. 175.

In *West Virginia*, where an agricultural society made an assignment for the benefit of certain other creditors of the proceeds arising from the agricultural fair, then advertised to be held on their ground a few days after, it was held to be void against the lien of a *feri facias*, which went into the hands of a sheriff before such proceeds had been paid over to such creditors. *Huling v. Cabell*, 9 W. Va. 522.

In *New Brunswick*, the general principle as to future acquired property is recognized in *Lloyd v. European & N. A. Ry. Co.*, 2 Pugs. & B. (N. B.) 194.

¹ *An expectancy and possibility.* — The expectancy or possibility is not subject of sale, grant, or mortgage. Thus a sale of fish, thereafter to be caught, passes no title to them when

caught. *Low v. Pew*, 108 Mass. 347; s. c. 11 Am. Rep. 357.

Sale of goods to be acquired. — Where a person sells goods of which he has not the present possession, or right of possession, or which are not the actual product of that of which he has the possession or right of possession, the sale is invalid, and will require some new act on his part indicating an intention of carrying the sale into effect in order to transfer the title to the purchaser. *Calkins v. Lockwood*, 16 Conn. 276; s. c. 41 Am. Dec. 143; *Head v. Goodwin*, 37 Me. 182; *Jones v. Richardson*, 51 Mass. (10 Metc.) 481; *Mitchell v. Winslow*, 2 Story C. C. 636. See, also, *Gittings v. Nelson*, 86 Ill. 591; *Dalton v. Laudahn*, 27 Mich. 529; *Brown v. Combs*, 63 N. Y. 598; *Phelps v. Murray*, 2 Tenn. Ch. 746, 753; s. c. 4 Cent. L. J. 583. But it was held in the case of *McCaffrey v. Woodin*, 65 N. Y. 459; s. c. 22 Am. Rep. 644, that while a transfer of property to be afterwards acquired, passes no title, yet it will operate as a license to what passes, and when possession is taken the title will vest in the mortgagee. See, also, *Cressey v. Sabre*, 17 Hun (N. Y.) 120; *Chynoweth v. Tenney*, 10 Wis. 397.

¹ *Frazier v. Hilliard*, 2 Strobh. (S. C.) 309; *Blackmore v. Shelby*,

common law and in equity, was twice argued, and thoroughly

8 Humph. (Tenn.) 439. But the prevailing American doctrine on this subject seems to be essentially the same as the English one. See Story on Sales, § 186, and cases cited in the notes. See, also, *Lazarus v. Andrade*, L. R. 5 C. P. Div. 318; *Leatham v. Amor*, 47 L. J. Q. B. 518; s. c. 38 L. T. R. 785; *In re Count D'Epineuit*, L. R. 20 Ch. Div. 758.

The equity rule.—In this country, as in England, the rule regarding the validity of mortgage or sale of property to be acquired differs in equity and law. See *Booker v. Jones*, 55 Ala. 266; *Apperson v. Moore*, 30 Ark. 56; *Calkins v. Lockwood*, 16 Conn. 276; s. c. 41 Am. Dec. 143; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431; *Wilson v. Wilson*, 37 Md. 1; s. c. 11 Am. Rep. 518; *Morrill v. Noyes*, 56 Me. 458; *Blanchard v. Cooke*, 144 Mass. 207; *Moody v. Wright*, 54 Mass. (13 Metc.) 17; *Sillers v. Lester*, 48 Miss. 513; *Smithurst v. Edmonds*, 14 N. J. Eq. (1 McCar.) 408; *McCaffrey v. Woodin*, 65 N. Y. 469; *Benjamin v. Elmira R. R. Co.*, 49 Barb. (N. Y.) 441; *Philadelphia, W. & B. R. Co. v. Woelpper*, 64 Pa. St. 366; *Williams v. Winsor*, 12 R. I. 9; *Phelps v. Murray*, 2 Tenn. Ch. 746; s. c. 4 Cent. L. J. 583; *Case v. Fish*, 58 Wis. 56; *Hunter v. Bosworth*, 43 Wis. 583; *Pierce v. Norwich, &c. R. R. Co.*, 4 Cliff. C. C. 351; *Brett v. Carter*, 2 Low. C. C. 458; *Mitchell v. Winslow*, 2 Story C. C. 636; *Shaw v. Bill*, 95 U. S. (5 Otto) 10; bk. 24, L. ed. 333; *Beall v. White*, 94 U. S. (4 Otto) 382; bk. 23, L. ed. 173; *Butt v. Ellett*, 86 U. S. (19 Wall.) 544; bk. 22, L. ed. 173; *Pennock v. Coe*, 64 U. S. (23 How.) 117; bk. 16, L. ed. 436; *Langton v. Horton*, 1 Hare, 549.

In Alabama, this subject, as relates to advances to raise crops, is regulated by statute. Code of Alabama, 1876, sec. 3286. See, also, *Flexner v. Dickerson*, 65 Ala. 129; *Carter v. Wilson*,

61 Ala. 434; *Griel v. Lehman*, 59 Ala. 419; *Stearns v. Gafford*, 56 Ala. 544; *McLester v. Somerville*, 54 Ala. 670; *Baswell v. Carlisle*, 54 Ala. 554; *McKeithen v. Pratt*, 53 Ala. 116; *Abraham v. Carter*, 53 Ala. 8. Aside from the statute such sale conveys only an equitable interest to the vendee. *Elmore v. Simon*, 67 Ala. 526; *Grant v. Steiner*, 65 Ala. 499; *Rees v. Coats*, 65 Ala. 256; *Booker v. Jones*, 55 Ala. 266; *Meyer v. Johnston*, 53 Ala. 237; *Abraham v. Carter*, 53 Ala. 8.

In Arkansas, the equity doctrine prevails. *Jarrat v. McDaniel*, 32 Ark. 598; *Tomlison v. Greenfield*, 31 Ark. 557; *Hamlett v. Tallman*, 30 Ark. 505; *Driver v. Jenkins*, 30 Ark. 120; *Apperson v. Moore*, 30 Ark. 56; constructed by statutory regulation.

In Georgia, as in Alabama, the matter is entirely regulated by statute. Georgia Code, sec. 1978. See, also, *Crine v. Tifts*, 65 Ga. 644; *Lee v. Clark*, 60 Ga. 639; *Lewis v. Lofley*, 60 Ga. 559; *Stallings v. Harold*, 60 Ga. 478; *Hardwick v. Burtz*, 59 Ga. 773; *Stephens v. Tucker*, 58 Ga. 391; *Powell v. Weaver*, 56 Ga. 288; *Ball v. Vason*, 56 Ga. 264; *Burrus v. Kyle*, 56 Ga. 24; *Stephens v. Tucker*, 55 Ga. 543; *Ware v. Simmons*, 55 Ga. 94; *Story v. Flournoy*, 55 Ga. 56; *Thomason v. Poullain*, 54 Ga. 306. Aside from this statute the sale of property to be acquired is invalid. See, also, Ga. Code, sec. 263; *Huntington v. Chrisholm*, 61 Ga. 270; *Redd v. Burrus*, 58 Ga. 574; *Stephens v. Tucker*, 55 Ga. 543. The Massachusetts courts hold that there is no difference between the rule in law and the rule in equity. *Moody v. Wright*, 54 Mass. (13 Metc.) 17; s. c. 14 Am. Dec. 706. This case is criticised in *Brett v. Carter*, 2 Low. C. C. 458, in which the court say: "The only decision that I can find, in equity, in this state, upon this subject, certainly decides very distinctly, that even in equity a mortgage after acquired

discussed and settled, in the case of *Holroyd v. Marshall*,² where Lord Westbury and Lord Chelmsford gave elaborate opinions, concurred in by Lord Wensleydale, although his Lordship's first impressions had been adverse to their conclusions. The Barons of the Exchequer held, however, in *Bolding v. Reed* (8 H. & C. 955; 34 L. J. Ex. 212), that the doctrine of *Holroyd v. Marshall* only applies to subsequently

chattels is invalid. *Moody v. Wright*, 64 Mass. (13 Metc.) 17; s. c. 14 Am. Dec. 706. In that case the court refused to follow the then recent decision of Story J. in *Mitchell v. Winslow*, 2 Story C. C. 630, and relied largely on the dictum of a very distinguished judge, Baron Parke, who said in *Mogg v. Baker*, 3 Mees. & W. 195, that there was no such lien in equity. Some years after these decisions were rendered the House of Lords unanimously followed the doctrine of Story J. and reversed the decision of Lord Colridge, which had been founded on the dictum already referred to, and Baron Parke concurred in the reversal of *Holroyd v. Marshall*, 10 H. L. Cas. 191. This was not a new doctrine in courts of equity. See *In re Howe*, 1 Paige Ch. (N. Y.) 129; *Langton v. Horton*, 1 Hare, 549; *Curtis v. Auber*, 1 Jac. & W. 532; *In re Ship Warre*, 8 Price, 269; *Douglas v. Russell*, 4 Sim. 524. These cases have been repeatedly followed in England, and even more often in this country, and "so far as I am aware, with not a single decision the other way of late years." The Judge then says: "I am not prepared to say that, if the supreme judicial court were now asked to review their decision in *Moody v. Wright*, *supra*, it is at all certain they would reverse it."

In Ohio.—A chattel mortgage purporting to create a lien on a stock in a grocery, and also on such stock as should be required by such mortgagor, creates no lien on the subsequently acquired property (*Chapman v. Wiemer*, 4 Ohio St. 481), unless

the mortgage authorizes the mortgagee to take possession of the property subsequently acquired, with an actual delivery, for taking possession, will transfer a valid title. *Coe v. Columbus P. & I. R. R. Co.*, 10 Ohio St. 372; s. c. 75 Am. Dec. 518.

In Canada, a mortgage of after-acquired chattels is valid as against an assignee in insolvency, but not as against judgment creditors. *Perrin v. Wood*, 21 Ont. Chan. (Grant) 492; *Mason v. McDonald*, 25 Up. Can. C. P. 435; *Cummings v. Morgan*, 12 Up. Can. Q. B. 565; *Shorttutton*, 12 Up. Can. Q. B. 79, 485. Thus in *Cummings v. Morgan*, *supra*, the plaintiffs held a mortgage of "700 pieces of timber together with whatever quantity of squared timber the said party of the first part might manufacture during the remainder of the season." The timber made after this mortgage was marked as it was gotten out, with the plaintiff's mark, but remained in the mortgagor's possession and was seized there by the defendant and execution creditors. The court held that the plaintiffs could not recover for it under their mortgage.

² 10 H. L. C. 191. And see judgment in *Reeves v. Whitmore*, 33 L. J. Ch. 63, as to distinction between a present transfer of future property and a mere power to seize it. See also *Brett v. Carter*, 2 Low. C. C. 458; *Holroyd v. Marshall*, 10 H. L. Cas. 191; s. c. 2 De G., F. & J. (Am. ed.) 596, note 1; *Mason v. McDonald*, 25 Up. Can. C. P. 435.

acquired property when so specifically acquired as to be identified.³

§ 96. In relation to executory contracts for the sale of goods not yet belonging to the vendor, Lord Tenterden held, in an early case¹ at Nisi Prius, that if goods be sold, to be delivered at a future day, and the seller has not the goods, nor any contract for them, nor any reasonable expectation of receiving them on consignment, but intends to go into the market and buy them, *it is not a valid [*81] contract, but a mere wager on the price of the commodity.² But this doctrine is quite exploded, and Bryan v. Lewis was expressly overruled by the Exchequer of Pleas in

³ Apperson v. Moor, 30 Ark. 56; Smithurst v. Edmunds, 14 N. J. Eq. (1 McCart.) 408; s. c. 21 Am. Rep. 170; Butt v. Ellett, 86 U. S. (19 Wall.) 544; bk. 22, L. ed. 183; Mitchell v. Winslow, 2 Story C. C. 644. Chancellor Cooper in Phelps v. Murray, 2 Tenn. Chan. 746; s. c. 4 Cent. L. J. 583, following Holroyd v. Marshall, holds that equity will not enforce a mortgage purporting to convey acquisitions or additions to a stock of goods, declaring that the "contract is invalid at law, and not enforceable in equity." See also Brett v. Carter, 2 Low. C. C. 468.

Mortgage of after-acquired property.—See as enforcing the doctrine of Holroyd v. Marshall, *supra*, and carrying it to its farthest limits, Lazarus v. Andrade, L. R. 5 C. P. Div. 318. See also Leatham v. Amor, 47 L. J. Q. B. 581; Belding v. Read, 3 Hurl. & C. 955. At common law a mortgage can operate only on property actually in existence at the time of giving the mortgage, and then belonging to the mortgagor, or potentially belonging to him, as an incident of property, belonging to him and then in existence. See Hunt v. Bullock, 23 Ill. 320; Roy v. Goings, 6 Ill. App. 162; Chapin v. Cram, 40 Me. 561; Wilson v. Wilson, 37 Md. 1; Rose v. Bevan, 10 Md. 466; s. c. 40 Am. Rep.

518; Hamilton v. Rogers, 8 Md. 301; Chesley v. Josselyn, 73 Mass. (7 Gray) 489; Pettis v. Kellogg, 61 Mass. (7 Cush.) 456; Codman v. Freeman, 57 Mass. (3 Cush.) 306; Barnard v. Eaton, 56 Mass. (2 Cush.) 204; Jones v. Richardson, 51 Mass. (10 Metc.) 481; Bonsey v. Amee, 25 Mass. (8 Pick.) 236; Wright v. Bircher, 5 Mo. Ap. 322, 327; Pierce v. Emery, 32 N. H. 505; Looker v. Peckwell, 38 N. J. L. (9 Vr.) 253; Gardner v. McEwen, 19 N. Y. 123; Ludwig v. Kipp, 20 Hun (N. Y.) 265; Fonville v. Casey, 1 Murph. (N. C.) 389; s. c. 4 Am. Dec. 561; Chapman v. Weimer, 4 Ohio St. 481; Cook v. Corthell, 11 R. I. 482; s. c. 23 Am. Rep. 583; Williams v. Briggs, 11 R. I. 476; s. c. 23 Am. Rep. 518; Hunter v. Bosworth, 43 Wis. 583; Comstock v. Scales, 7 Wis. 159; Letourno v. Ringgold, 3 Cr. C. C. 103; Wagner v. Watts, 2 Cr. C. C. 169.

Mortgage by lessee with privilege of purchase conveys a valid lien on such interest as the lessee may have. See Chase v. Ingalls, 122 Mass. 381; Harrington v. King, 121 Mass. 269; Currier v. Knapp, 117 Mass. 324.

¹ § 96. Bryan v. Lewis, Ry. & Moo. 386, in 1826.

² See Chase v. Ingalls, 122 Mass. 381.

Hibblewhite v. McMorris,³ and Mortimer v. McCallan,⁴ after being questioned in the Common Pleas in Wells v. Porter.⁵

The law in relation to time bargains for the sale of chattels not belonging to the vendor, when merely colorable devices for gambling in the rise and fall of prices, is treated *post*, Book III., Chapter 3.⁶

§ 97. In America it has been decided, that if a vendor sell a thing not belonging to him, and subsequently acquires a title to it before the repudiation of the contract by the purchaser, the property in the thing sold vests immediately in the purchaser.¹ So in a contract of "sale or return,"

³ 5 Mees. & W. 462. See, also, Phillips v. Ocmulgee Mills, 55 Ga. 633; Cole v. Milmine, 88 Ill. 349; The Bank of Toronto v. McDougall, 28 Up. Can. C. P. 345; Clark v. Foss, 7 Biss. C. C. 540.

⁴ 6 Mees. & W. 58.

⁵ 2 Bing. N. C. 722; s. c. 3 Scott, 141.

⁶ Logan v. Musick, 81 Ill. 215; Pixley v. Boynton, 79 Ill. 351; Wolcott v. Heath, 78 Ill. 433; Whitehead v. Root, 2 Met. (Ky.) 584; Clarke v. Foss, 7 Biss. C. C. 540.

Gambling contract.—Contracts of sale that do not contemplate actual *bond fide* delivery of the property by the seller nor the payment by the buyer, but are intended to be settled by paying the difference in price, at some future time, are gambling contracts and invalid. Lyon v. Culbertson, 83 Ill. 33; s. c. 25 Am. Rep. 349; Kirkpatrick v. Bonsall, 72 Pa. St. 155; *In re Green*, 7 Biss. C. C. 338. See Ruckman v. Bryan, 3 Den. (N. Y.) 340; Hooker v. Knab, 26 Wis. 511; Armstrong v. Toler, 24 U. S. (11 Wheat.) 258; bk. 6, L. ed. 468. The form of the contract is not conclusive; for although legal on its face, the courts will look into the real intention of the parties, and ascertain whether the transaction was a sale or a mere bet upon the after price of the article. See Pickering v. Cease,

8 Chicago Leg. N. 340; Cassard v. Hinman, 1 Bosw. (N. Y.) 207; Kirkpatrick v. Bonsall, 72 Pa. St. 155; *In re Green*, 7 Biss. C. C. 338; Grizewood v. Blane, 11 C. B. 526; s. c. 78 Eng. C. L. 526; 20 Eng. L. & Eq. 290; Rourke v. Short, 25 L. J. Q. B. 196; Enderby v. Gilpin, 5 J. B. Moore, 571.

Sale of stocks, certificates, etc.—The Massachusetts Gen. Stat. c. 105, § 6, was enacted to prohibit gambling in stocks. Bingham v. Mead, 92 Mass. (10 Allen) 245. Under it, an agreement for the sale of stock, and certain certificates, and evidences of debt are void where the party contracting to sell is not at the time the owner or assignee, or authorized by the owner or assignee, or his agent to sell or transfer the same. See Brown v. Phelps, 103 Mass. 313; Barrett v. Mead, 92 Mass. (10 Allen) 337; Wyman v. Fiske, 85 Mass. (3 Allen) 238; s. c. 80 Am. Dec. 166; Barrett v. Hyde, 73 Mass. (7 Gray) 160.

¹ *American rule.*—The prevailing doctrine on this subject in America is essentially the same as the English. *Vide ante*, § 94, note 1.

See, also, Frazier v. Hillard, 2 Strobh. (S. C.) 309; Blackmore v. Shelby, 8 Humph. (Tenn.) 439. But see Head v. Goodwin, 37 Me. 181; Jones v. Richardson, 51 Mass. (10 Metc.) 481; *vide ante*, § 93, note 2.

where the vendor had no title at the time of sale, but acquired one afterwards, before the time limited for the return; held, that the buyer who had allowed the time to elapse without returning the thing sold, could not set up the failure of consideration in the original contract, as a defence in an action for the price.²

§ 98. The civilians held that an expectation dependent on a chance may be sold, and the illustration usually given is that of the fisherman who agrees to sell a cast of his net for a given price;¹ and this is adopted by Mr. Story.² The illustration is perhaps not very well chosen. The case supposed is rather one of work and labor done, than of sale. The fisherman owns nothing but the tools of his trade, *i.e.* his net. What is in the sea is as much the property * of anybody else as of himself. If a third person [*82] gives him money to throw a cast of his net for the benefit of that person, the contract is in its nature an employment of the fisherman for hire. If the contract were, that the fisherman should throw his net for a week or a month, at a certain sum per week or month, and that the catch should belong to him who paid the money, no one would call this a contract by the fisherman for the sale of his catch, but a contract of hire of his labor in fishing for an employer. It is no more a contract of sale when he is paid by the job

Sale of expectancy. — As to the sale of an expected interest in and to a parent's estate, see *Wheeler v. Wheeler*, 2 Met. (Ky.) 474; *Jenkins v. Stetson*, 91 Mass. (9 Allen) 128; *Trull v. Eastman*, 44 Mass. (3 Metc.) 121; s. c. 37 Am. Dec. 156; *Fitch v. Fitch*, 25 Mass. (8 Pick.) 480; *Kennedy v. Tucker*, 8 Mass. 143; *Boynton v. Hubbard*, 7 Mass. 112; *Quarles v. Quarles*, 4 Mass. 680; *Field v. Mayor of New York*, 6 N. Y. 179; s. c. 67 Am. Dec. 435; *Stover v. Eycleshimer*, 4 Abb. App. Dec. (N. Y.) 309; *Munsell v. Lewis*, 4 Hill. (N. Y.) 635, 642; *Martin v. Marlow*, 65 N. C. 695; *McDonald v. McDonald*, 5 Jones (N. C.) Eq. 211; *Needles v. Needles*, 7 Ohio St. 432; s. c. 70 Am. Dec. 85;

Powers' Appeal, 63 Pa. St. 443, 445; *Fitzgerald v. Vestal*, 4 Sneed (Tenn.) 258.

² *Hotchkiss v. Oliver*, 5 Denio (N. Y.) 314.

¹ Dig. L. 8, § 1, de Contr. empt. Pothier Vente, No. 6. But it is held in this country that a sale of fish hereafter to be caught in the sea does not pass title to the fish when caught. *Low v. Pew*, 108 Mass. 347; s. c. 11 Am. Rep. 357; see, also, *Rice v. Stone*, 83 Mass. (1 Allen) 566; *Mulhall v. Quinn*, 67 Mass. (1 Gray) 106; s. c. 61 Am. Dec. 414; *Codman v. Freeman*, 57 Mass. (3 Cush.) 309; *Moody v. Wright*, 54 Mass. (13 Metc.) 17; s. c. 46 Am. Dec. 706.

² Story on Sales, No. 191.

or piece, for a single cast, than when he is paid by the month for all his casts.³ But though the illustration may be questioned, the rule itself is correct in principle, and might be exemplified by supposing a sale by a pearl fisherman of any pearls that might be found in oysters already taken by him, and which had thus become his property. Such a contract would not be a bargain and sale at common law, but would be a valid executory contract, binding the purchaser to pay the price, even if no pearls were found; for as was said by Lord Chief Baron Richards, in *Hitchcock v. Giddings*,⁴ "If a man will make a purchase of a chance, he must abide by the consequences."⁵

The rules of law applicable to the sale of things immoral, noxious, or illegal, are discussed *post*, Book III. Chapter 3, on Illegality.

³ The vexed subject of the true test by which to determine whether certain contracts are in their nature contracts of sale, or contracts for work and labor, and materials furnished, is discussed *post*, Part. II. Chapter 1, page 90.

⁴ 4 Price, 135.

⁵ See, also, observations of Lord Campbell C. J. in *Hanks v. Pulling*,

6 E. & B. 659; 25 L. J. Q. B. 375.

Sale of business chance and good-will.
— *Boon v. Moss*, 70 N. Y. 465; *Hathaway v. Bennett*, 10 N. Y. 108; s. c. 61 Am. Dec. 739; see *Dayton v. Wilkes*, 17 How. (N. Y.) Pr. 510; *Fleming v. Bevan*, 2 Pa. St. 408; *Tweed v. Mills*, L. R. 1 C. P. 39; *Churton v. Douglas*, 1 H. R. V. Johnson, 174.

* CHAPTER V.

[*83]

OF THE PRICE.

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§ 99. It has already been stated that the price must consist of *money*, paid or promised.¹ The payment of the price in sales for cash or on credit will be the subject of future consideration, when the Performance of the Contract is discussed. We are now concerned solely with the agreement to make a contract of sale.

Where the price has been expressly agreed on, there can arise no question; but the price of goods sold may be determined by other means.² If nothing has been said as to price

¹ *Price, money or other equivalent.*— There can be no sale without a price in money (see *Wolf v. Wolf*, 12 La. An. 529; *Williamson v. Berry*, 49 U. S. (8 How.) 465, 544; bk. 12, L. ed. 1171, 1191; *Shep. Touch.* 241; *Noyes Maxims*, ch. 42; 2 *Bouv. L. Dict.* (15th ed.) 457; but it does not necessarily follow that the act is void, because it wants this requisite of sale (*Wolf v. Wolf*, 12 La. An. 539; *Rhodes v. Rhodes*, 10 La. 85), because it is well settled that the price may be either in money or in property (*Nance v. Metcalf*, 19 Mo. App. 183; s. c. 1 West. Rep. 441), a sale being properly a transfer of property for a valuable consideration. *Howard v. Harris*, 90 Mass. (8 Allen) 297, 299; 2 Kent Com. 468. The word "price" may mean an equivalent or compensation, whether in money or other property.

Hudson Iron Co. v. Alger, 54 N. Y. 173, 177. And so may be agreed upon indirectly, such as the market price at a certain day, so much less or so much more than the market price at that time. See *Cunningham v. Brown*, 44 Wis. 72; *McConnell v. Hughes*, 29 Wis. 537; *Ames v. Quimby*, 96 U. S. (6 Otto) 324; bk. 24, L. ed. 365; *McBride v. Silverthorne*, 11 Up. Can. Q. B. 545.

² *Fixing price.*— Where there is a conflict in the evidence as to the price agreed upon, the real value of the article may be shown. *Hillembrand v. Wittkemper*, 79 Ind. 180; *Johnson v. Harder*, 45 Iowa, 677; *Norris v. Spofford*, 127 Mass. 85; *Brewer v. Housatonic R. R. Co.*, 107 Mass. 277; *Saunders v. Clark*, 106 Mass. 331; *Parker v. Coburn*, 92 Mass. (10 Allen) 82; *Rennell v. Kim-*

when a commodity is sold, the law implies an understanding that it is to be paid for at what it is reasonably worth. In *Acebal v. Levy*,³ the Court of Common Pleas, while deciding this to be the rule of law in cases of *executed* contracts, expressly declined to determine whether it was also applicable to *executory* agreements. But in the subsequent case of *Hoadly v. McLaine*,⁴ the same Court decided that in an executory contract, where no price had been fixed, the vendor could recover in an action against the buyer, for not accepting the goods, the reasonable value of them;⁵ and this is the unquestionable rule of law.⁶

ball, 87 Mass. (5 Allen) 356; *Bradbury v. Dwight*, 44 Mass. (3 Metc.) 31.

³ 10 Bing. 376.

⁴ 10 Bing. 482.

See, also, *McBride v. Silverthorne*, 11 Up. Can. Q. B. 545.

⁵ Where no price is fixed by the parties, the law fixes it at what the article is reasonably worth (*McEwen v. Morey*, 60 Ill. 32; *Traft v. Travis*, 136 Mass. 95; *James v. Muir*, 33 Mich. 224; *Harrison v. Glover*, 72 N. Y. 461; *Kountz v. Kirkpatrick*, 72 Pa. St. 376, 386; s. c. 13 Am. Rep. 687; *Blydenburgh v. Welsh*, Bald. C. C. 331, 340; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Hoadly v. McLaine*, 10 Bing. 482; *Acebal v. Levy*, 10 Bing. 376; *Joyce v. Swann*, 17 C. B. N. S. 84; *Valpy v. Gibson*, 4 C. B. 837; *Cooper v. Shuttleworth*, 25 L. J. Ex. 114; *Thurnell v. Balbirnie*, 2 Mees & W. 786; *Wilks v. Davis*, 3 Meriv. 507; *Milnes v. Gery*, 14 Ves. 400; 2 Black. Com. 443, 445), which is ordinarily the current price at the time and place of sale (*McEwen v. Morey*, 60 Ill. 32; *James v. Muir*, 33 Mich. 223; *Dickson v. Jordan*, 12 Ired. (N. C.) L. 79; s. c. 53 Am. Dec. 403; *Fenton v. Braden*, 2 Cr. C. C. 550); however, this price will not govern whenever it is unnaturally inflated. *Kountz v. Kirkpatrick*, 72 Pa. St. 376; s. c. 13 Am. Rep. 687; *James v. Muir*, 33 Mich. 223, 227;

Joyce v. Swann, 17 C. B. (N. S.) 84; *Valpy v. Gibson*, 4 C. B. 837; s. c. 16 L. J. C. P. 241; 11 Jur. 826.

⁶ *Valpy v. Gibson*, 4 C. B. 837; 2 Saund. 121e, n. 2, by Williams, Serg. to Webber v. Tivill.

See, *Callaghan v. Myers*, 89 Ill. 566; *McEwen v. Morey*, 60 Ill. 32; *Jenkins v. Richardson*, 6 J. J. Marsh. (Ky.) 442; s. c. 22 Am. Dec. 82; *James v. Muir*, 33 Mich. 223; *Foster v. Lumberman's Mining Co.* (Mich.) 12 West. Rep. 530; *Cunningham v. Ashbrook*, 20 Mo. 553, 559; *Brady v. Cassidy*, 104 N. Y. 147; s. c. 6 Cent. Rep. 73; *Dickson v. Jordan*, 12 Ired. (N. C.) L. 79; s. c. 53 Am. Dec. 403; *Fenton v. Braden*, 2 Cr. C. C. 550.

Price to be fixed. — *Failure to agree.* — Where the price is to be afterwards fixed and the parties fail to agree upon the price, there is no sale. *Wittkowsky v. Wasson*, 71 N. C. 461. In this case the court say, a sale is a transfer of the absolute or general property, for a price in money, and the price must be certain, for there can be no executed sale so as to pass the property, where the price is to be fixed by agreement between the parties afterwards, and the parties do not agree. Citing and approving, *State v. Vinson*, 63 N. C. 335; *State v. Revels*, 1 Busbee (N. C.) L. 200; *Devane v. Fennell*, 2 Ired. (N. C.) L. 36; *Cobb v. Fogelman*, 1 Ired.

§ 100. *In *Acebal v. Levy*, the Court further de- [*84] clared that where the contract is implied to be at a reasonable price, this means, "Such a price as the jury upon the trial of the cause shall, under all the circumstances, decide to be reasonable. This price may or may not agree with the *current price* of the commodity at the port of shipment at the precise time when such shipment is made. The current price of the day may be highly unreasonable from accidental circumstances, as on account of the commodity having been purposely kept back by the vendor himself, or with reference to the price at other ports in the immediate vicinity, or from various other causes."

§ 101. It is not uncommon for the parties to agree that the price of the goods sold shall be fixed by valuers appointed by them. In such cases they are of course bound by their bargain, and the price when so fixed is as much a part of the contract as if fixed by themselves.¹ But it is essential to

(N. C.) L. 440; *Jordan v. Lissiter*, 6 Jones (N. C.) L. 180; *Sutton v. Madre*, 2 Jones (N. C.) L. 320. Particularly is this true where the property has not been delivered. *Bigley v. Risher*, 63 Pa. St. 152. But a contract of sale is not invalid because it does not fix the price, if it furnishes a criterion for determining the same. *McConnell v. Hughes*, 29 Wis. 537; *Ames v. Quimby*, 96 U. S. (8 Otto) 324; bk. 24, L. ed. 635. See, also, *Easterlin v. Ryander*, 59 Ga. 292.

¹ *Newlan v. Dunham*, 60 Ill. 238; *Nutting v. Dickinson*, 90 Mass. (8 Allen) 540; *Brown v. Bellows*, 21 Mass. (4 Pick.) 178; *Mason v. Phelps*, 48 Mich. 126; *Bass v. Veltum*, 28 Minn. 512; *Cunningham v. Ashbrook*, 20 Mo. 553; *Fuller v. Bean*, 34 N. H. 301, 304; *McCandlish v. Newman*, 22 Pa. St. 460.

In *Georgia*, an agreement that in case of failure to agree upon the market value of the goods sold, the parties shall each call in a merchant, and on failure to agree, they shall call in a third, and together fix the

price, is a valid contract of sale. *Willingham v. Veal*, 74 Ga. 755.

In *Indiana* the vendor may determine the quantity and quality for the vendee. *Woburn Wheel Co. v. Philbrook*, 76 Ind. 516.

In *Iowa* it has been held that on a sale of property, the amount to be ascertained in a particular manner, the purchaser can recover for the deficiency where the quantity is determined in the manner specified in the contract. *Brown v. Cole*, 45 Iowa, 601. The same doctrine prevails in New Brunswick. *McLeigh v. Robinson*, 2 Pugs. & B. (N. B.) 83.

In *Mississippi* it is held that a contract depending upon the happening of a certain event, as the return of a vessel from her first voyage, or the like, is binding and enforceable, although the event never happens. See *Randall v. Johnson*, 59 Miss. 317; s. c. 42 Am. Rep. 365. To same effect, see *Williston v. Perkins*, 51 Cal. 554; *Hicks v. Shouse*, 17 B. Mon. (Ky.) 483; *Crooker v. Holmes*, 65 Me. 195; *Sears v. Wright*, 24 Me.

the formation of the contract that the price should be fixed in accordance with this agreement, and if the persons appointed as valuers fail, or refuse to act, there is no contract in the case of an *executory* agreement, even though one of the parties should himself be the cause of preventing the valuation.² But if the agreement has been executed by the delivery of the goods, the vendor would be entitled to recover the value estimated by the jury, if the purchaser should do any act to obstruct or render impossible the valuation, as in *Clarke v. Westroppe*,³ where the defendant had agreed to buy certain goods at a valuation, and the valuers disagreed, and the defendant thereupon consumed the goods, so that a valuation became impossible.⁴

278; *Ubsdell v. Cunningham*, 22 Mo. 124; *Nunez v. Dautel*, 86 U. S. (19 Wall.) 560; bk. 22, L. ed. 161.

In *Wisconsin* a sale of a quantity of grain at a stipulated amount, less than the current market price, on a day to be named by the vendor, is a valid sale and passes title to the purchaser. *McConnell v. Hughes*, 29 Wis. 537. To the same effect, *Easterlin v. Rylander*, 59 Ga. 292; *Ames v. Quimby*, 96 U. S. (3 Otto) 324; bk. 24, L. ed. 635.

² *Thurnell v. Balbirnie*, 2 C. B. 786; *Cooper v. Shuttleworth*, 25 L. J. Ex. 114; *Vickers v. Vickers*, 4 Eq. 529; *Milnes v. Gery*, 14 Ves. 400; *Wilkes v. Davis*, 3 Mer. 507. See, also, *Wittkowsky v. Wasson*, 71 N. C. 451; *Fuller v. Bean*, 34 N. H. 304; *De Cew v. Clark*, 19 Up. Can. C. P. 155.

³ 18 C. B. 765; 25 L. J. C. P. 287; *Wittkowsky v. Wasson*, 71 N. C. 456.

⁴ *Fixing value by arbitration*. — The parties may agree that the value of the article may be fixed by persons to be selected. *Norton v. Gale*, 95 Ill. 533; s. c. 35 Am. Rep. 173; *McAuley v. Carter*, 22 Ill. 53; *Oakes v. Moore*, 24 Me. 214; s. c. 41 Am. Dec. 379; *Mason v. Bridge*, 14 Me. 468; s. c. 31 Am. Dec. 66; *Brown v. Bellows*, 21 Mass. (4 Pick.) 179;

Curry v. Lackey, 35 Mo. 389; *Garred v. Macey*, 10 Mo. 161; *Rochester v. Whitehouse*, 15 N. H. 468; *Garr v. Gomez*, 9 Wend. (N. Y.) 649; *Collins v. Collins*, 26 Beav. 306; *In re Lee & Hemingway*, 3 Nev. & M. 860. In such case the sale is not regarded as complete, and title does not pass until the price has been so fixed. *Hutton v. Moore*, 26 Ark. 382; *Whitwell v. Vincent*, 21 Mass. (4 Pick.) 449; s. c. 16 Am. Dec. 355; *Barrett v. Pritchard*, 19 Mass. (2 Pick.) 512; s. c. 13 Am. Dec. 449; *Randall v. Johnson*, 59 Miss. 317; s. c. 42 Am. Rep. 365; *Fuller v. Bean*, 34 N. H. 290; *Warren v. Buckminster*, 24 N. H. (4 Fost.) 336; *Luey v. Bundy*, 9 N. H. 298; s. c. 32 Am. Dec. 359; *Delaware and H. C. Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Manwell v. Briggs*, 17 Vt. 176; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Alexander v. Gardner*, 1 Bing. N. C. 671; *Scott v. Corporation of Liverpool*, 3 De G. & J. 334; *Hanson v. Meyer*, 6 East, 614. However, the rule is otherwise where the vendee renders such determination impossible (*Humaston v. American Tel. Co.*, 87 U. S. (20 Wall.) 20; bk. 22, L. ed. 279), because prevention of performance is equivalent to actual performance. *Smyth v. Craig*, 3

§ 102. Where the parties have agreed to fix a price by the valuation of third persons, this is not equivalent to a submission to "arbitration," within the Common Law Procedure Act¹ * (17 & 18 Vict. c. 125, s. 12), [*85] and it was therefore held in *Bos v. Helsham*,² that where one party had appointed a valuer, and the other, after a notice in writing, had declined to do the same, as required by the contract, the 18th section of the Act did not apply, so as to authorize the valuer appointed to act by himself as a sole arbitrator.

It has been held, however, that if the persons named as valuers accept the office or employment for reward or compensation, they are liable in damages to the parties to the contract for neglect or default in performing their duties.³ [And in an action against the valuer for negligence the plaintiff is entitled to interrogate him as to the basis of his valuation.⁴]

§ 103. In the civil law it was a settled rule that there could be no sale without a price certain. ["It seems to be

Watts & S. (Pa.) 14. But where the ascertainment of the value is rendered impossible by the act of the vendee, the price of things sold must be fixed by the jury, on a quantum value. *Humaston v. American Tel. Co.*, 87 U. S. (20 Wall.) 20; bk. 22, L. ed. 279. See, also, *Kenniston v. Ham*, 29 N. H. (9 Fost.) 506; *Hollday v. Marshall*, 7 Johns. (N. Y.) 213; *United States v. Wilkins*, 19 U. S. (6 Wheat.) 135, 143; bk. 5, L. ed. 225; *Inchbald v. Western, etc., Plantation Co.*, 17 C. B. N. S. 733; s. c. 112 Eng. C. L. 733; *Hall v. Conder*, 2 C. B. N. S. 53; s. c. 89 Eng. C. L. 53; *Cowper v. Andrews*, Hobart, 40, 48. See *Hutton v. Moore*, 26 Ark. 382, 394; *Norton v. Gale*, 95 Ill. 533; s. c. 35 Am. Rep. 173; *Newlan v. Dunham*, 60 Ill. 233; *Nutting v. Dickinson*, 90 Mass. (8 Allen) 540; *Brown v. Bellows*, 21 Mass. (4 Pick.) 178, 189; *De Cew v. Clark*, 19 Up. Can. C. P. 155. See *infra*, sec. 351.

¹ *Collins v. Collins*, 26 Beav. 306; 28 L. J. Ch. 184; *Vickers v. Vickers*, 4 Eq. 529; *Turner v. Goulden*, L. R. 9 C. P. 57.

² L. R. 2 Ex. 72; 36 L. J. Ex. But see *Re Hopper*, L. R. 2 Q. B. 367; *Re Anglo-Italian Bank*, L. R. 2 Q. B. 452.

³ *Jenkins v. Beetham*, 15 C. B. 189; 24 L. J. C. P. 94; *Cooper v. Shuttleworth*, 25 L. J. Ex. 114.

Liability of appraisers.—The appraisers will be liable for gross negligence, although they act gratuitously, but not for refusal to act. *McGee v. Bast*, 6 J. J. Marsh. (Ky.) 453; *Fellowes v. Gordon*, 8 B. Mon. (Ky.) 415; *Whitney v. Lee*, 49 Mass. (8 Metc.) 91; *Thorne v. Deas*, 4 Johns. (N. Y.) 84; *Balfe v. West*, 13 C. B. 466; s. c. 22 L. J. C. P. 175; s. c. 76 Eng. C. L. 465.

⁴ *Turner v. Goulden*, L. R. 9 C. P. 57, where the distinction is drawn between a valuer and an arbitrator.

of the very essence of a sale," says Story J. that there should be a fixed price for the purchase. The language of the civil law on this subject is the language of common sense." ¹] "Pretium autem constitui oportet, nam nulla emptio sine pretio esse protest; sed et certum esse debet," was the language of the Institutes. ² And it was a subject of long contest among the earlier juriconsults whether the necessity for a *certain* price did not render invalid an agreement that the price should be fixed by a third person; but Justinian put an end to the question by positive legislation: "Alioquin si inter aliquos ita convenerit, ut quanti Titius rem æstimaverit tanti sit empta, inter veteres satis abundeque hoc dubitabatur sive constat venditio sive non. Sed nostra decisio ita hoc constituit, ut quotiens sic composita sit venditio, *quanti ille æstimaverit*, sub hac conditione staret contractus: ut si quidem ipse qui nominatus est pretium definierit, omnimodo secundum ejus æstimationem et [*86] pretium persolvatur et res * tradatur, et venditio ad effectum perducatur, emptore quidem ex empto actione, venditore ex vendito agente. Sin autem ille qui nominatus est, vel noluerit vel non potuerit pretium definire, tunc pro nihilo esse venditionem quasi nullo pretio statuto: Quod jus, cum in venditionibus nobis placuit, non est absurdum et in locationibus et conductionibus trahere." ³

These rules have been adopted into the Code Napoléon:—
 Art. 1591—"Le prix de la vente doit être déterminé et désigné par les parties." 1592—"Il peut cependant être laissé à l'arbitrage d'un tiers: si le tiers ne veut ou ne peut faire l'estimation, il n'y a point de vente."

¹ *Flagg v. Mann*, 2 Sumn. C. C. 486, 539. See *Fuller v. Bean*, 34 N. H. 290; *Andrews v. Whitehead*, 13 East, 102; *Maddock v. Stock*, 4 Up. Can. Q. B. 118; *Elvidge v. Richardson*, 3 Up. Can. Q. B. 149.

² Lib. 3, tit. 23, sec. 1. See, also, *Huneceius*, ad Pand., Lib. 6, sec. 302; *Id. Dig.* 18, 6, 8; *Pothier de Vente*, p. 4, sec. 309.

³ Lib. 3, tit. 23, sec. 1.

*PART II.

[*87]

SALES UNDER THE STATUTE OF FRAUDS.

CHAPTER I.

WHAT CONTRACTS ARE WITHIN THE STATUTE.

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"Value" and "price" of 10l. . 90	ally approved 103
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§ 104. THE common law which recognized the validity of verbal contracts of sale of chattels, for any amount, and however proven, was greatly modified by the statute of 29 Chas. II. c. 3. This celebrated enactment, familiarly known as the "Statute of Frauds,"¹ is now in force not only in Eng-

¹ *Purpose of the requirements of statute.* — The purpose of the Statute of Frauds is to prevent fraud and falsehood, by requiring a party, who seeks to enforce an oral contract in court, to produce as additional evidence, some written memorandum, signed by the party sought to be charged, or proof of some act confirmatory of the contract relied on; but it does not prohibit such contracts, neither does it declare them void or illegal unless certain formalities are observed. *Townsend v. Hargraves*, 118 Mass. 325, 334. If such a contract be executed the effect of its performance is not to change the rights of

the parties, and the consideration may be recovered. *Jellison v. Jordan*, 68 Me. 373; *Richards v. Allen*, 17 Me. 296; *Basford v. Pearsons*, 91 Mass. (9 Allen) 387; *Nutting v. Dickinson*, 90 Mass. (8 Allen) 540; *Cook v. Doggett*, 84 Mass. (2 Allen) 439; *Braman v. Dowse*, 66 Mass. (12 Cush.) 227; *Pike v. Brown*, 61 Mass. (7 Cush.) 133; *Felch v. Taylor*, 30 Mass. (13 Pick.) 133; *Stone v. Denison*, 30 Mass. (13 Pick.) 1; s. c. 23 Am. Dec. 654; *Goodwin v. Gilbert*, 9 Mass. 510; *Story v. Hamilton*, 86 N. Y. 428; *Day v. N. Y. Cent. R. R. Co.*, 51 N. Y. 583; affirmed in 89 N. Y. 616; *Galvin v. Prentice*, 45 N. Y. 162;

land and most of our colonies, but exists, with some slight variations, in almost every State of the American Union.²

s. c. 6 Am. Rep. 58; *Erben v. Lorillard*, 19 N. Y. 299; *Baldwin v. Palmer*, 10 N. Y. 232; s. c. 61 Am. Dec. 743; *Lisk v. Sherman*, 25 Barb. (N. Y.) 436; *King v. Brown*, 2 Hill. (N. Y.) 486; *Wheeler v. Spencer*, 24 Hun (N. Y.) 29; *Rosepaugh v. Vredenburg*, 16 Hun (N. Y.) 60; *Wood v. Shultis*, 4 Hun (N. Y.) 309; *Gillet v. Maynard*, 5 Johns. (N. Y.) 85; s. c. 4 Am. Dec. 329; *Royden v. Crane* (N. Y. Sup. Ct.), 7 Alb. L. J. 208; *Towsley v. Moore*, 30 Ohio St. 184; s. c. 27 Am. Rep. 434; *Randall v. Turner*, 17 Ohio St. 262.

The memorandum required by the statute is the memorandum of only that of the parties; the alternative act of the seventeenth section proceeds from only that; they presuppose a contract and are in affirmance of partial execution of it; they are not essential to its existence, need not be contemporaneous, and are not prescribed elements in its formation. There is a difference in the phraseology between the fourth and seventeenth sections, but in view of the policy of the enactment and the necessity of giving consistency to its parts, this difference cannot be held to change the force and effect of the sections. *Townsend v. Hargraves*, 118 Mass. 325, 334. See *Chicago Dock Co. v. Kinzie*, 49 Ill. 289; *Glen v. Rogers*, 3 Md. 312, 320; *Chase v. Fitz*, 132 Mass. 359; *Ames v. Jackson*, 115 Mass. 608; *Cahill v. Bigelow*, 35 Mass. (18 Pick.) 369.

When statute not enforced.—The Statute of Frauds will not be enforced where its application would work a fraud. *Hidden v. Jordan*, 21 Cal. 92; *Towsley v. Moore*, 30 Ohio St. 184; s. c. 27 Am. Rep. 434. For the rule of equity always has been that the statute is not to be allowed as a protection of fraud, or as a means of seducing the unwary into false con-

fidences whereby their intentions are thwarted and their confidences betrayed. *Jenkins v. Eldridge*, 3 Story C. C. 181, 290; *Montacute v. Maxwell*, 1 P. Wms. 618, 621. See Story's Eq. Jur. secs. 250, 252, 759, 768, 1265.

² *Statute of Frauds.*—That part of the Statute of Frauds which especially affects the sale of chattels (§ 17) is modified by the statutes in California, Iowa, New York, and perhaps other states, and is not in force in Delaware, Illinois, Kansas, Kentucky, Mississippi, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas and Virginia. See Brown on Statute of Frauds. By the statutes in the various states, the price at or above which oral contracts are not enforceable, varies from \$30 to \$300. In Arkansas, the amount is \$30; in California, \$200; Connecticut, \$50. In Florida the provision extends to all sales; in Indiana, \$50; Maine, \$30; Massachusetts, \$50; Michigan, \$50; Minnesota, \$50; Mississippi, \$50; Missouri, \$30; Montana, \$200; Nebraska, \$50; New Hampshire, \$33; New Jersey, \$30; New York, \$50; Nevada, \$50; Oregon, \$50; Utah, \$300; Vermont, \$40; and in Wisconsin it is \$50.

Conflict of provisions of the statute.—The *lex loci contractus* controls the construction and validity of the contract in relation to personal property (*Evans v. Kittrell*, 33 Ala. 449; *Laird v. Hodges*, 26 Ark. 356; *Webster v. Howe Machine Co.*, 54 Conn. 394; s. c. 3 N. Eng. Rep. 567; 8 Atl. Rep. 482; 24 Cent. L. J. 419; *Griswold v. Golding* (Ky.), 3 S. W. Rep. 535; s. c. 24 Cent. L. J. 419; *Trasher v. Everhart*, 3 Gill. & J. (Md.) 234; *Weil v. Golden*, 141 Mass. 364; *Ivey v. Lalland*, 42 Miss. 444; s. c. 2 Am. Rep. 606; *Brown v. Nevitt*, 27 Miss. 801; *Gilman v. Stevens*, 63 N. H.

Its history was but imperfectly known till the year 1823, when Lord Eldon gave to Mr. Swanston, the reporter of his decisions, the MSS. of Lord Nottingham,³ among which was his Lordship's report of the case of *Ash v. Abdy*,⁴ in which he said, on the 13th of June, 1678, less than two years after *the passage of the law, that he over- [*88]

342; *Bliss v. Brainard*, 41 N. H. 256; *Smith v. Godfrey*, 28 N. H. (8 Fost.) 379; s. c. 61 Am. Dec. 617; *Atwater v. Walker*, 16 N. J. Eq. (1 C. E. Gr.) 42; *Walker v. Atwater*, 15 N. J. Eq. (2 McCar.) 502; *Armour v. McMichael*, 36 N. J. L. (7 Vr.) 92, 94; *Marvin Safe Co. v. Norton*, 48 N. J. L. (19 Vr.) 410; s. c. 5 Cent. Rep. 341; 7 Atl. Rep. 418; 24 Cent. L. J. 161; *Hyde v. Goodnow*, 3 N. Y. 266; *Crosby v. Berger*, 3 Edw. Ch. (N. Y.) 538; *Scoville v. Canfield*, 14 Johns. (N. Y.) 338; s. c. 7 Am. Dec. 467; *Thompson v. Ketcham*, 8 Johns. (N. Y.) 189; s. c. 5 Am. Dec. 332; *Northrup v. Foot*, 14 Wend. (N. Y.) 248; *Touro v. Cassin*, 1 Nott & McC. (S. C.) 173; s. c. 9 Am. Dec. 680; *Shelton v. Marshall*, 16 Tex. 344; *Pickering v. Fisk*, 6 Vt. 102; *Bainbridge v. Wilcocks*, Bald. C. C. 536; *Webster v. Massey*, 2 Wash. C. C. 157; *Courtois v. Carpenter*, 1 Wash. C. C. 376; *Camfranque v. Burnell*, 1 Wash. C. C. 340), unless it appears on the face of the contract that it was made in reference to the laws of some other place; in which case it would be governed by the law of the place of performance. *Lee v. Selleck*, 32 Barb. (N. Y.) 522; s. c. 20 How. (N. Y.) Pr. 275; *Sherrill v. Hopkins*, 1 Cow. (N. Y.) 103; *Pittsburgh & St. L. R. Co. v. Rothschild*, (Pa.) 4 Cent. Rep. 109; *Andrews v. Pond*, 38 U. S. (13 Pet.) 65; bk. 10, L. ed. 61; *Bank of United States v. Daniel*, 37 U. S. (12 Pet.) 32; bk. 9, L. ed. 989; *Bank of United States v. Donnally*, 33 U. S. (8 Pet.) 361; bk. 8, L. ed. 974; *Cox v. United States*, 31 U. S. (6 Pet.) 172; bk. 8, L. ed. 359; *Armstrong v. Toler*, 24 U. S.

(11 Wheat.) 258; bk. 6, L. ed. 468; *Willings v. Consequa*, Pet. C. C. 301; *Nicolls v. Rodgers*, 2 Paine C. C. 437; *Pope v. Nickerson*, 3 Story C. C. 465; *Golden v. Prince*, 3 Wash. C. C. 313; *Morgan v. New Orleans, M. & T. R. Co.*, 2 Wood. C. C. 244; *Fitch v. Remer*, 8 Am. L. Reg. 654. Consequently, when a contract is entered into in one state concerning personal property, which property is situated and the contract to be performed in another state, it must be made according to the law of the state where the property is situated and the contract to be performed. *Vandal v. Thompson*, 11 Martin (La.) 23; *Houghtaling v. Ball*, 20 Mo. 563; *Dacosta v. Davis*, 24 N. J. L. (4 Zab.) 319; *Low v. Andrews*, 1 Story C. C. 38; *Allen v. Schuchardt* (U. S. C. C.) 1 Am. L. Reg. N. S. 13; *Green v. Lewis*, 26 Up. Can. Q. B. 618. *Contra*: *Leroux v. Brown*, 12 C. B. 801; s. c. 74 Eng. C. L. 800; 14 Eng. L. & Eq. 247.

* See note to *Crowley's Case*, 2 Swans. 83.

³ 3 Swans. 664, Appendix. In North's "Life of Lord Keeper Guildford," vol. i. p. 108, he states of his lordship: "He had a great hand in the Statute of Frauds and Perjuries, of which the Lord Nottingham said that every line was worth a subsidy. But at that time the Lord Chief Justice Hale had the pre-eminence, and was chief in the fixing of that law, although the urging party lay upon him, and I have reason to think it had the first spring from his Lordship's notice." Lord Mansfield doubted the statement as to Sir Matthew Hale, who died before the bill was introduced. 1 Burr. 418.

ruled a demurrer to a bill which "was to execute a parol agreement, before the late act, for prevention of frauds and perjuries, but the bill itself was exhibited since the act." The ground of the decision was, that the statute was intended to be prospective solely, and not retrospective, "and I said, that I had some reason to know the meaning of this law, for it had its first rise from me, who brought in the bill into the Lords' House, though it afterwards received some additions and improvements from the judges and the civilians."⁵

§ 105. The section of the statute which is specially applicable to the subject of this Treatise is the 17th. In the examination of its provisions, and of the rules for its construction and application, the arrangement of Lord Blackburn will be followed, as not susceptible of improvement. The language of the 17th section is as follows:

"And be it enacted, that from and after the said four-and-twentieth day of June (A.D. 1677), no contract for the sale of any goods, wares, or merchandises, for the *price*¹ of ten pounds sterling, or upwards,² shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part-payment, or that some note or memorandum in writing of the said bargain be made, and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."³

⁵ As to the traditions of the aid and co-operation of Lord Hale and Sir Leoline Jenkins, see *Wain v. Warlters*, 5 East, 10; *Windham v. Chetwynd*, 1 Burr. 419; Wynn's "Life of Sir Leoline Jenkins," vol. i. p. 3.

¹ This word changed to "value," *post*, p. 90.

² *The sum fixed by the different states.* — The provisions of the Statute of Frauds in the different states differ from the English statutes and from each other as to the sum necessary to bring the contract within them. *Vide ante*, § 104, note 2. The seventeenth section of the Statute of Frauds was

never in force in Texas, where the old Spanish law prevailed (see *Rev. Stat. Tex.* 1879, tit. 46, art. 2464; *Hobart v. Littlefield*, 13 R. I. 341), and was omitted from the Rhode Island Digest of law, 1751, and has not been re-enacted since. *Hobart v. Littlefield*, 13 R. I. 341.

³ *Effect of the seventeenth section.* — There is an unsettled question of considerable importance, whether the seventeenth section of the Statute of Frauds, renders void a contract within its terms, or merely prevents its enforcement, leaving the contract in full force for all other purposes. It has been held in Massachusetts that

§ 106. The first question that obviously presents itself under this enactment is, what contracts are embraced under the words "contracts for the sale of any goods, &c." A contract may be perfectly binding between the parties, so as to give either of them a remedy against the person and general estate of *the other in case of default, [*89] but having no effect to transfer the property or right of possession in the goods themselves, and therefore giving to the proposed purchaser none of the rights, and subjecting him to none of the liabilities of an owner; and this is an "Executory Agreement."

Or it may be a perfect sale, as already defined, conveying the absolute general property in the thing sold to the purchaser, entitling him to the goods themselves, independently of any personal remedy against the vendor for breach of contract, and rendering him liable to the risk of loss in case of their destruction; and this is a "Bargain and Sale of Goods."

§ 107. The distinction between these two agreements will be more fully considered hereafter; but for the present

where a contract is partly within the Statute of Frauds and is severable, that an action may be maintained on so much of it as is not within the statute. *Haynes v. Nice*, 100 Mass. 327; s. c. 1 Am. Rep. 109; *Allen v. Leonard*, 82 Mass. (16 Gray) 202; *Rand v. Mather*, 65 Mass. (11 Cush.) 1; s. c. 59 Am. Dec. 131. That the seventeenth section makes the contract void was held in *Houghtaling v. Ball*, 20 Mo. 563; *Low v. Andrews*, 1 Story C. C. 38; *Allen v. Schuchardt*, (U. S. C. C.) 1 Am. L. Reg. N. S. 13; *Green v. Lewis*, 26 Up. Can. Q. B. 618; *Leroux v. Brown*, 12 C. B. 801; s. c. 74 Eng. C. L. 800; 14 Eng. L. & Eq. 247; Pollock's "Principles of Contracts," 755, note b. That the seventeenth section affects only the remedy was held in *Amsinck v. American Ins. Co.*, 129 Mass. 185; *Townsend v. Hargraves*, 118 Mass. 325, 334; *Haynes v. Nice*, 100 Mass. 327; s. c.

1 Am. Rep. 109; *Norton v. Simonds*, 124 Mass. 19, 21; *Browne on Statute of Frauds*, (ed. 1857) p. 140, note 5. Citing dicta, *Reade v. Lamb*, 6 Ex. (6 W. H. & G.) 430; *Carrington v. Roots*, 2 Mees. & W. 248.

In all those states where the statute conforms in substance to the seventeenth section of the English statute, such statute affects only the remedy and not the contract, and the objection that the contract is not valid under the statute, is not available to a party not privy to the contract. *Chicago Dock Co. v. Kinzie*, 49 Ill. 289; *Cahill v. Bigelow*, 35 Mass. (18 Pick.) 369; *Rickards v. Cunningham*, 10 Neb. 417; *McCormick v. Drummett*, 9 Neb. 384; *Eiseley v. Malchow*, 9 Neb. 174; *Uhl v. Robison*, 8 Neb. 273; *Robison v. Uhl*, 6 Neb. 328; *Davis v. Inscocoe*, 84 N. C. 396; *Green v. North Carolina R. R. Co.*, 77 N. C. 95; *Mizell v. Burnett*, 4 Jones (N. C.)

it suffices to remark, that until the year 1828, the decisions were somewhat contradictory, and perhaps irreconcilable, on the question whether the words, "contracts for the sale of any goods, &c." in this section, were applicable to agreements for future delivery, that is to say, to executory agreements, or only to such as were equivalent to the common law contract, known as a bargain and sale.¹ The decisions excluding such contracts from the operation of the statute were principally *Towers v. Osborne*,² in 1724, *Clayton v. Andrews*,³ in 1767, and *Groves v. Buck*,⁴ in 1814. Those which upheld the contrary rule, were *Rondeau v. Wyatt*,⁵ in 1792, *Cooper v. Elston*,⁶ in 1796, and *Garbutt v. Watson*,⁷ in 1822. The question is no longer open, for the Legislature intervened, and in 9 Geo. IV. c. 14, s. 7, known as "Lord Tenterden's Act," recited, that "it had been held that the

L. 249; s. c. 69 Am. Dec. 744; *Smith v. Smith*, 14 Vt. 440, 446.

¹ *Executory contracts*. — The statute applies to executory contracts. *Atwater v. Hough*, 29 Conn. 513; s. c. 79 Am. Dec. 229; *Edwards v. Grand Trunk Ry. Co.*, 48 Me. 379; *Hight v. Ripley*, 19 Me. 137; *Newman v. Morris*, 4 Harr. & McH. (Md.) 221; *Bennett v. Hull*, 10 Johns. (N. Y.) 364; *Jackson v. Covert*, 5 Wend. (N. Y.) 139; *Finney v. Apgar*, 31 N. J. L. (2 Vr.) 270; *Carman v. Smick*, 15 N. J. L. (3 J. S. Gr.) 252; *Ide v. Stanton*, 15 Vt. 685; s. c. 40 Am. Dec. 698; *Bennett v. Hull*, 10 Johns. (N. Y.) 364. See, also, *Cason v. Cheely*, 6 Ga. 554; *Edwards v. Grand Trunk R. R.*, 48 Me. 379; *Mixer v. Howarth*, 38 Mass. (21 Pick.) 207; s. c. 32 Am. Dec. 256; *Pitkin v. Noyes*, 48 N. H. 297; s. c. 2 Am. Rep. 218; *Finney v. Apgar*, 31 N. J. L. (2 Vr.) 270; *Jackson v. Covert*, 5 Wend. (N. Y.) 139; *Hardell v. McClure*, 1 Chand. (Wis.) 279. The Supreme Court of Maine say in *Hight v. Ripley*, 19 Me. 137, that, "It may be considered as now settled that the Statute of Frauds embraces executory as well as executed contracts for the sale of

goods." *Cason v. Cheely*, 6 Ga. 554; *Edwards v. Grand Trunk Ry. Co.*, 48 Me. 379; *Mixer v. Howarth*, 38 Mass. (21 Pick.) 207; s. c. 32 Am. Dec. 256; *Pitkin v. Noyes*, 48 N. H. 297; s. c. 2 Am. Rep. 218; *Gilman v. Hill*, 36 N. H. 318; *Sewall v. Fitch*, 8 Cow. (N. Y.) 215; *Bennett v. Hull*, 10 Johns. (N. Y.) 364; *Downs v. Ross*, 23 Wend. (N. Y.) 270; 2 Kent Com. 511.

² 1 Strange, 506.

³ 4 Burr. 2101.

⁴ 3 M. & S. 178.

The American doctrine. — The English doctrine is not followed in America, with the possible exception of in New York. *Vide infra*, § 118, note 6. It is sometimes said that the English doctrine prevails in Maryland as well as in New York, but this is not justified by the decisions. *Vide infra*, § 123, note 3.

In Canada it seems the English doctrine is repudiated. *Lane v. Melville*, 3 Up. Can. C. P. (O. S.) 127; *Wegg v. Drake*, 16 Up. Can. Q. B. 252.

⁵ 2 H. Bl. 63.

⁶ 7 T. R. 14.

⁷ 5 B. & Ald. 613.

said recited enactments" (i.e. the 17th section of the Statute of Frauds) "do not extend to certain executory contracts for the sale of goods, which nevertheless are within the mischief thereby intended to be remedied," and then proceeded to enact that the provisions of the 17th section "shall extend to all contracts for the sale of goods of the *value* of ten pounds sterling, and upwards, notwithstanding the goods may be intended to be *delivered at some [*90] future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

It is settled in *Scott v. Eastern Counties Railway Company*,⁸ and in *Harman v. Reeves*,⁹ that this enactment must be construed as incorporated with the Statute of Frauds, and that its effect is to substitute the word "value" for "price" in the 17th section.

§ 108. There have been numerous decisions, and much diversity and even conflict of opinion, in relation to the proper principle by which to test whether certain contracts are "contracts for the sale, &c." under the 17th section, or contracts for work and labor done and materials furnished. A review of the cases will exhibit the different lights in which the subject has presented itself to the minds of eminent judges.

*Towers v. Osborne*¹ was on an agreement to make and furnish a chariot. Held, not within the statute. But the ground of decision in this case was, that the 17th section did not apply to executory agreements, and on this point the case is met by Lord Tenterden's Act.

In *Clayton v. Andrews*,² a contract for the future delivery of wheat not yet threshed was held not within the statute, under the authority of the preceding case.

⁸ 12 M. & W. 33.

⁹ 18 C. B. 587, and 25 L. J. C. P. 257.

¹ 1 Strange, 506.

² 4 Burr. 2201. This case is followed in Maryland. See *Eichelberger v. McCauley*, 5 Harr. & J. (Md.) 213; s. c. 9 Am. Dec. 514.

§ 109. In *Groves v. Buck*,¹ the agreement was for the purchase by defendant of a quantity of oak pins, *not then in existence*, but that were to be cut by plaintiff out of slabs owned by him, and to be delivered at a future time. This agreement was held not to be embraced in the 17th section of the Statute of Frauds. Lord Ellenborough put his opinion on the ground that "*the subject-matter of this contract did not exist in rerum naturâ* : it was incapable of delivery and of part acceptance, and where that is the case, the contract has been considered not within the statute." This ground is [*91] again met by the *9 Geo. IV. c. 14, s. 7, but Dampier J. in declining to apply the case of *Rondeau v. Wyatt* (presently noticed), said that this last-mentioned case was distinguishable, because in the other cases cited "some work was to be performed."

§ 110. In *Rondeau v. Wyatt*,¹ where an executory contract was held to be within the statute, Lord Loughborough said, that "the case of *Towers v. Sir John Osborne* was plainly out of the statute, not because it was an executory contract, as has been said, but because it was *for work and labor to be done and materials and other necessary things to be found*, which is different from a mere contract of sale, to which alone the statute is applicable."² His Lordship also disposed of the case of *Clayton v. Andrews*³ (subsequently overruled in *Garbutt v. Watson*⁴), by saying that in that case also "there was some work to be performed, for it was necessary that the corn should be threshed before the delivery."

§ 111. In *Garbutt v. Watson*,¹ where a sale of flour, to be manufactured out of wheat yet unground, was held to be

¹ 3 Mees. & S. 178. This case was followed in South Carolina, in *Gadden v. Lance*, 1 McMull. (S. C.) Eq. 87, 91; s. c. 37 Am. Dec. 548; but that case is not law since *Bird v. Muhlinbrink*, 1 Rich. (S. C.) L. 199; s. c. 44 Am. Dec. 247.

² 2 H. Bl. 63.

³ The court say in *Hight v. Ripley*, 19 Me. 137, 139, that "The decision in the case of *Towers v. Osborne* is esteemed to have been correct, while

the reasons for it are rejected as erroneous. The chariot bespoken does not appear to have existed at the time, but to have been manufactured to order."

⁴ 4 Burr. 2101.

⁵ 5 B. & Ald. 613.

¹ *Id.* The doctrine of this case has been adopted in Wisconsin. See *Meincke v. Falk*, 55 Wis. 427; *Hardell v. McClure*, 1 Chand. (Wis.) 277; s. c. 2 Pin. 289.

within the statute, Abbott C. J. said, that in *Towers v. Osborne*, "the chariot which was ordered to be made, *would never, but for that order, have had any existence.*"² This ex-

² A contract to furnish articles to be manufactured or prepared in a prescribed manner is not effected by the Statute of Frauds. *Abbott v. Gilchrist*, 38 Me. 260; *Cummings v. Dennett*, 26 Me. 397; *Hight v. Ripley*, 19 Me. 137; *Spencer v. Cone*, 42 Mass. (1 Metc.) 283; *Mixer v. Howarth*, 38 Mass. (21 Pick.) 205; s. c. 32 Am. Dec. 256; *Gilman v. Hill*, 36 N. H. 311, 317; *Cooke v. Millard*, 65 N. Y. 352; s. c. 22 Am. Rep. 619; s. c. 5 Lans. 343; *Parsons v. Loucks*, 48 N. Y. 17, 19; s. c. 8 Am. Rep. 517. See *Cason v. Cheely*, 6 Ga. 554; *Rentch v. Long*, 27 Md. 188; *Eichelberger v. McCauley*, 5 Harr. & J. (Md.) 213; s. c. 19 Am. Dec. 514; *Higgins v. Murray*, 73 N. Y. 252; *Deal v. Maxwell*, 51 N. Y. 652; *Flint v. Corbitt*, 5 Daly (N. Y.) 429; *Wright v. O'Brien*, 5 Daly (N. Y.) 54; *Smith v. New York Central R. R.*, 4 Keyes (N. Y.) 180; *Downs v. Ross*, 23 Wend. (N. Y.) 270; *Bates v. Coster*, 3 N. Y. Supr. Ct. (T. & C.) 580. See, also, *Seymour v. Davis*, 2 Sandf. (N. Y.) 239; *O'Neil v. New York & S. P. Mining Co.*, 3 Nev. 141; *Cooke v. Millard*, 5 Lans. (N. Y.) 243; s. c. 65 N. Y. 352; 22 Am. Rep. 619; *Passaic Manuf. Co. v. Hoffman*, 3 Daly (N. Y.) 495; *Bates v. Coster*, 1 Hun (N. Y.) 400; *Kellogg v. Witherhead*, 4 Hun (N. Y.) 273; *Smith v. New York Cent. R. R. Co.*, 4 Keyes (N. Y.) 180; *Parsons v. Loucks*, 48 N. Y. 17; s. c. 8 Am. Rep. 518; *Deal v. Maxwell*, 51 N. Y. 652; *Courtwright v. Stewart*, 19 Barb. (N. Y.) 455; *Bronson v. Wiman*, 10 Barb. (N. Y.) 406; *Killmore v. Howlett*, 48 N. Y. 569; *Kellogg v. Witherhead*, 4 Hun (N. Y.) 273; s. c. 6 N. Y. Supr. Ct. (T. & C.) 525. See *Allen v. Jarvis*, 20 Conn. 38; *Cason v. Cheely*, 6 Ga. 554; *Brown v. Allen*, 35 Iowa, 306; *Partridge v. Wilsey*, 8 Iowa, 459; *Crockett v. Scribner*, 64 Me. 447; *Edwards v. Grand Trunk Ry.*, 48 Me. 379; *Fickett v. Swift*, 41 Me. 68; s. c. 66 Am. Dec. 214; *May v. Ward*, 134 Mass. 127; *Dowling v. McKenney*, 124 Mass. 480; *Goddard v. Binney*, 115 Mass. 450; s. c. 15 Am. Rep. 112; *Waterman v. Meigs*, 58 Mass. (4 Cush.) 499; *Lamb v. Crafts*, 53 Mass. (12 Metc.) 356; *Gardner v. Joy*, 50 Mass. (9 Metc.) 179; *Spencer v. Cone*, 42 Mass. (1 Metc.) 283; *Brown v. Sanborn*, 21 Minn. 402; *Phipps v. McFarlane*, 3 Minn. 109; s. c. 74 Am. Dec. 743; *Pitkin v. Noyes*, 48 N. H. 298; s. c. 2 Am. Rep. 218; *Higgins v. Murray*, 73 N. Y. 252; *Mead v. Case*, 33 Barb. (N. Y.) 202; *Parker v. Schenck*, 28 Barb. (N. Y.) 30; *Donovan v. Willson*, 26 Barb. (N. Y.) 138; *Courtwright v. Stewart*, 19 Barb. (N. Y.) 455; *Bronson v. Wiman*, 10 Barb. (N. Y.) 406; *Sewall v. Fitch*, 8 Cow. (N. Y.) 215; *Lower v. Winters*, 7 Cow. (N. Y.) 263; *Donnell v. Hearn*, 12 Daly (N. Y.) 230; *Crookshank v. Burrell*, 18 Johns. (N. Y.) 58; s. c. 9 Am. Dec. 187; *Frear v. Hardenberg*, 5 Johns. (N. Y.) 275; s. c. 4 Am. Dec. 356; *Robertson v. Vaughn*, 5 Sandf. (N. Y.) 1; *Hobart v. Littlefield*, 13 R. I. 341; *Ellison v. Brigham*, 38 Vt. 64; *Gorham v. Fisher*, 30 Vt. 428; *Hardell v. McClure*, 1 Chand. (Wis.) 271; *Wolfenden v. Wilson*, 33 Up. Can. Q. B. 442; *Wegg v. Drake*, 16 Up. Can. Q. B. 252. But see *Prescott v. Locke*, 51 N. H. 94; s. c. 12 Am. Rep. 55. As to sale of articles kept in the ordinary course of business, see *Atwater v. Hough*, 29 Conn. 509; s. c. 79 Am. Dec. 229. See, also, *Cason v. Cheely*, 6 Ga. 554; *Phipps v. McFarlane*, 3 Minn. 109; s. c. 74 Am. Dec. 743; *O'Neil v. New York & C. Mining Co.*, 3 Nev. 141; *Finney v. Appgar*, 31 N. J. L. (2 Vr.) 271; *Gasden v.*

pression, as well as the similar one by Lord Ellenborough in *Groves v. Buck* (*ante*, p. 90), would imply that the distinction between a "contract for sale" and one for "work, labor, and materials," is tested by the inquiry, whether the thing transferred is one not in existence, and which would never have existed but for the order of the party desiring to acquire it, or a thing which would have existed, and been the subject of sale to some other person, even if the order had never been given. Bayley J. however, put his opinion on the ground, that "this was substantially a contract for the sale of flour, and it seems to me immaterial whether the flour was at the time ground or not. The question is, whether this was a contract for goods, or for work and labor and materials found. I think it was the former, and if so, it falls within the Statute of Frauds."⁸

[*92] *Holroyd J. concurred "that this was a contract for the sale of goods," but neither of the judges gave a reason for this opinion (undoubtedly correct), and thus no aid is afforded by their language in furnishing a test for distinguishing the two contracts from each other.

§ 112. In *Smith v. Surman*¹ an action was brought to recover the value of certain timber, under a verbal contract, by which plaintiff agreed to sell to defendant at so much per

Lance, 1 McMull. (S. C.) Eq. 87; s. c. 37 Am. Dec. 548; *Bird v. Muhlenbrink*, 1 Rich. (S. C.) L. 199; s. c. 44 Am. Dec. 247; *Meincke v. Falk*, 55 Wis. 427; s. c. 42 Am. Rep. 722; *Hardell v. McClure*, 1 Chand. (Wis.) 271. The fact that the article is not made is not necessary to take the case out of the statute. *Fickett v. Swift*, 41 Me. 68; s. c. 66 Am. Dec. 214; *Hight v. Ripley*, 19 Me. 137. See, also, *Clark v. Nichols*, 107 Mass. 547. The court distinguish *Mixer v. Howarth*, 38 Mass. (21 Pick.) 205; s. c. 32 Am. Dec. 251; *Spencer v. Cone*, 42 Mass. (1 Metc.) 283, and follow *Waterman v. Meigs*, 58 Mass. (4 Cush.) 497; *Lamb v. Crafts*, 53 Mass. (12 Metc.) 353; *Gardner v. Joy*, 50 Mass. (9 Metc.) 177.

As to the Massachusetts rule, see *May v. Ward*, 134 Mass. 127; *Clark v. Nichols*, 107 Mass. 547; *Waterman v. Meigs*, 58 Mass. (4 Cush.) 497; *Lamb v. Crafts*, 53 Mass. (12 Metc.) 353; *Gardner v. Joy*, 50 Mass. (9 Metc.) 177. For New Hampshire doctrine, see *Prescott v. Locke*, 51 N. H. 94; s. c. 12 Am. Rep. 155; *Pitkin v. Noyes*, 48 N. H. 294; s. c. 2 Am. Rep. 219; *Gilman v. Hill*, 36 N. H. 811. See, also, *Gorham v. Fisher*, 30 Vt. 428.

⁸ See *Edwards v. Grand Trunk Ry. Co.*, 54 Me. 105, 110.

¹ 9 Barn. & Cress. 568. See, also, *Prescott v. Locke*, 51 N. H. 94, 97; s. c. 12 Am. Rep. 55; *Pitkin v. Noyes*, 48 N. H. 298.

foot the timber contained in certain trees then growing on plaintiff's land. Bayley J. was of opinion, that "this was a contract for the future sale of the timber when it should be in a state fit for delivery. The vendor, so long as he was felling it and preparing it for delivery, *was doing work for himself, and not for the defendant.*"

§ 113. In *Atkinson v. Bell*¹ the whole subject was much discussed. The action was in assumpsit for goods sold and delivered, goods bargained and sold, work and labor done, and materials found and provided. The facts were, that one Kay had patented a certain machine, and the defendants, thread manufacturers, desiring to try it, wrote him *an order to procure to be made for them as soon as possible* some spinning-frames in the manner he most approved of. Kay employed Sleddon to make them for the defendants, informing Sleddon of the order received by him, and he superintended the work. After the frames were made they lay for a month on Sleddon's premises, while he was doing some other work for the defendants under Kay's superintendence. Kay then ordered Sleddon to make some changes in the frames, and after this was done, the frames were put into boxes by Kay's directions, and remained in the boxes for some time on Sleddon's premises. On the 23d of June, Sleddon wrote to the defendants that the machines had been ready for three weeks, and asked how they were to be sent. On the 8th of August, Sleddon became bankrupt, and his assignees required the defendants to take the machines; but they refused, whereupon action was brought. The judges were all of opinion that *the property in the goods had not [*93] vested in the defendants,² and that a count for goods bargained and sold could not be maintained; but Bayley and Holroyd JJ. expressed the opinion that a count for not accepting would have supported the verdict in the plaintiff's favor. On the count for work and labor and materials, the judges were also unanimous that these had been furnished by Sleddon for his own benefit, and not for the defendant's, that is to say, that the contract was an executory agreement

¹ 10 Barn. & Cress. 277.

² On this subject see *post*, Book II.

for sale, and not one for work, &c. Bayley J. said: "If you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labor and your materials to any other person. Having bestowed his labor at your request, on your materials, he may maintain an action against you for work and labor done. But if you employ another to work up his own materials for making a chattel, then he may appropriate the produce of that labor and materials to any other person. No right to maintain any action vests in him during the progress of the work, but when the chattel has assumed the character bargained for, and *the employer has accepted it*, the party employed may maintain an action for goods sold and delivered; or if the employer refuses to accept, a special action on the case for such refusal; but he cannot maintain an action for work and labor, *because his labor was bestowed on his own materials*, and for himself, and not for the person who employed him."

The concluding passage of this opinion is no doubt too broadly expressed, for although true generally, it is not universally the case that an action for work and labor will not lie when performed on materials that are the property of the workman. This inaccurate *dictum* had the effect for a time of weakening the authority of *Atkinson v. Bell*,³ subjecting it to the criticism of Maule and Erle JJ. in *Grafton v.*

Armitage,⁴ and of Pollock C. B. in *Clay v. Yates*,⁵

[*94] but * it was fully recognized in the subsequent case of *Lee v. Griffin*.⁶

§ 114. *Grafton v. Armitage*¹ was a somewhat singular case. The plaintiff was a working engineer. The defendant was the inventor of a life-buoy, in the construction of which curved metal tubes were used. The defendant employed plaintiff to devise some plan for a machine for curving the tubes. The plaintiff made drawings and experiments, and ultimately produced a drum or mandrel, which

³ See remarks on another point decided in *Atkinson v. Bell*, *post*, Book II. Ch. 5.

⁴ 2 C. B. 336; 15 L. J. C. P. 20.

⁵ 25 L. J. Ex. 237; 1 H. & N. 73.

⁶ 30 L. J. Q. B. 252; 1 B. & S. 272.

¹ 2 C. B. 336; 15 L. J. C. P. 20.

effected the object required. His action was *debt* for work, labor, and materials, and for money due on accounts stated. The particulars were "for scheming and experimenting for, and making a plan-drawing of, a machine, &c., engaged three days, at one guinea per day, 3*l.* 3*s.*; for workman's time in making, &c., and experimenting therewith, 1*l.* 5*s.*; for use of lathe for one week, 12*s.*; for wood and iron to make the drum, and for brass tubing for the experiments, 5*s.*" Defendant insisted, on the authority of *Atkinson v. Bell*, that the action should have been case for not accepting the goods, not debt for work and labor, &c., citing the *dictum* at the close of Bayley J.'s opinion. But Maule J. said: "In order to sustain a count for work and labor, it is not necessary that the work and labor should be performed upon materials that are the property of the *plaintiff* (*sic*, plainly meaning *defendant*), or that are to be handed over to him." Erle J. said: "Suppose an attorney were employed to prepare a partnership or other deed, the draft would be upon his own paper, and made with his own pen and ink: might he not maintain an action for work and labor in preparing it?" In delivering the decision, Tindal C. J. pointed out as the distinction, that in *Atkinson v. Bell*, the substance of the contract was that the machines to be manufactured were to be sold to the defendant, but that in the case before the Court the substance of the contract was not that the plaintiff should manufacture the article for sale to the defendant, but that he should employ his skill, labor and materials in devising for the use * of defendant a mode of attain- [*95] ing a given object. Coltman J. concurred, and said that the opinion of Bayley J. was on "precisely the same ground as the Lord Chief Justice puts this case. The claim of a tailor or a shoemaker is for the price of goods when delivered, and not for the work or labor bestowed by him in the fabrication of them."

§ 115. In *Clay v. Yates*,¹ the subject was treated by Pollock C. B. in 1856, as a matter entirely *res nova*. The contract was that the plaintiff, a printer, should print for the

¹ 25 L. J. Ex. 237; 1 H. & N. 73.

defendant a second edition of a work previously published by the defendant, the plaintiff to find the materials, including the paper. Held, that this was not a contract for the sale of a thing to be delivered at a future time, nor a contract for making a thing to be sold when completed, but a contract to do work and labor, furnishing the materials; and that the case was not governed by Lord Tenterden's Act. Pollock C. B. said: "As to the first point, whether this is an action for goods sold and delivered, and requiring a memorandum in writing, within the 17th section of the Statute of Frauds, I am of opinion that this is properly an action for work and labor, and materials found. I believe it is laid down in the commencement of Chitty on Pleading, that that is the count that may be resorted to by farriers, by medical men, by apothecaries, and I think he mentions surveyors distinctly, and that is the form in which they are in the habit of suing. The point made in the case cited, in which Bayley J. gave an opinion (*Atkinson v. Bell*), I think may be answered by the opinion of Maule J. in the Court of Common Pleas (*Grafton v. Armitage*); and then we have to decide the matter as if it were now without any authority at all. It may be that in all these cases, part of the materials is found by the party for whom the work is done, and the other part found by the person who is to do the work. There may be the case where the paper is to be found by one, and the printing by the other, and so on; the ink, no doubt, is always found by the printer. But it seems to me

the true rule is this, whether the work and labor is of the
 [*96] *essence of the * contract, or whether it is the materials*
that are found. My impression is, that in a case of

work of art, whether it be silver or gold, or marble, or common plaster, that is a case of the application of labor of the highest description, and the material is of no sort of importance as compared with the labor, and therefore that all this would be recoverable as work and labor, and materials found. I do not mean to say the price might not be recovered as goods sold and delivered if the work were completed and sent home. No doubt it is a chattel that was bargained for and delivered, and it might be recovered as goods sold and

delivered ; but still it would not prevent the price being recovered as work and labor, and materials found. It appears to me, therefore, that this was properly sued for as work and labor, and materials found, and that the Statute of Frauds does not apply ; and *I am rather inclined to think that it is only where the bargain is merely for goods thereafter to be made, and not where it is a mixed contract of work and labor, and materials found, that the Act of Lord Tenterden applies ;* and one of the reasons why you find no cases on this subject in the books is, that before Lord Tenterden's Act passed, the Statute of Frauds did not apply to the case of a thing begun, whatever it might be."

Alderson B. concurred, and Martin B. said : "There are three matters of charge well known in the law — for labor simply, for work and materials, and another for goods sold and delivered. And I apprehend every case must be judged of by itself. What is the present case? The defendant having written a manuscript, takes it to the printer to have it printed for him. What does he intend to be done? He intends that the printer shall use his types, and that he shall set them up by putting them in a frame ; that he shall print the work on paper, and that the paper shall be submitted to the author ; that the author shall correct it and send it back to the printer, and then the latter shall exercise labor again, and make it into a perfect and complete thing, in the shape of a book. I think the plaintiff was employed to do work and labor, and supply materials for it, and he * is to be paid for it ; and it really seems to me *that* [*97] *the true criterion is this : Supposing there was no contract as to payment, and the plaintiff had brought an action, and sought to recover the value of that which he had delivered, would that be the value of the book as a book? I apprehend not, for the book might not be worth half the value of the paper it was written on. It is clear the printer would be entitled to be paid for his work and labor, and for the materials he had used upon the work ; and, therefore, this is a case of work, labor and materials done and provided by the printer for the defendant.*" The learned Baron also put this case : "Suppose an artist paints a portrait for three hundred

guineas, and supplies the canvas for it worth 10s., surely he might recover on a count for work and labor."

§ 116. In *Lee v. Griffin*,¹ the last reported case, the foregoing *opinions* of the Chief Baron and Baron Martin were questioned, and not followed, though the *decision* was approved. This action was brought by a dentist, to recover 21l. for two sets of artificial teeth made for a deceased lady, of whom the defendant was executor. When *Clay v. Yates* was quoted by the plaintiff in support of the position that the skill of the dentist was the thing really contracted for, that the materials were only auxiliary, and that the count for work and labor was therefore maintainable, Hill J. said: "*Clay v. Yates* is a case *sui generis*. The printer, the plaintiff there, in effect does work chiefly on the materials which the defendant supplied; although, to a certain extent, the plaintiff may be said to supply materials, *moreover the printer could not sell the book to any one else.*"

Crompton J. said: "*When the contract is such that a chattel is ultimately to be delivered by the plaintiff to the defendant, when it has been sent, then the cause of action is goods sold and delivered.* The case of *Clay v. Yates* turned, as my brother Hill pointed out, upon the peculiar circumstances of the case. I have some doubt upon the propriety of the decision, but we should be bound by it in a case [*98] *precisely similar in its circumstances, which the present is not. *I do not agree with the proposition, that wherever skill is to be exercised in carrying out the contract, that fact makes it a contract for work and labor, and not for the sale of a chattel.* It may be, the cause of action is for work and labor when the materials supplied are merely auxiliary, as in the case put of an attorney or printer. But in the present case, the goods to be furnished, viz., *the teeth, are the principal subject-matter*; and the case is nearer that of a tailor, who measures for a garment, and afterwards supplies the article fitted."

¹ 30 L. J. Q. B. 252; 1 B. & S. 272. The doctrine of *Lee v. Griffin* has been followed in Connecticut (*Atwater v. Hough*, 29 Conn. 108; s. c. 79 Am. Dec.

229); in Minnesota (*Birch v. Bailey*, 21 Minn. 402); in New Hampshire (*Prescott v. Locke*, 51 N. H. 94); and in the province of Ontario (*Wolfen-*

Hill J. said: "I think the decision in *Clay v. Yates* perfectly correct, according to the particular subject-matter of the contract in that case, which was not a case of a chattel ordered by one of another, thereafter to be made by the one and afterwards to be delivered to the other; but *when the subject-matter of the contract is a chattel to be afterwards delivered, then the cause of action is goods sold and delivered, and the seller cannot sue for work and labor.* In my opinion, *Atkinson v. Bell* is good law, subject only to the objection to the *dictum* of Bayley J. which has been repudiated by Maule J. and Earle J. in *Grafton v. Armitage*."

Blackburn J. said: "If the contract be such that *it will result in the sale of a chattel*, the proper form of action, if the employer refuses to accept the article when made, would be for not accepting. But *if the work and labor be bestowed in such a manner as that the result would not be any thing which could properly be said to be the subject of sale, then an action for work and labor is the proper remedy.* In *Clay v. Yates*, the circumstances were peculiar; but had the contract been completed, it could scarcely perhaps have been said that the result was the sale of a chattel. . . .

I do not think that the relative value of the labor and of the materials on which it is bestowed can in any case be the test of what is the cause of action; and that if Benvenuto Cellini had contracted to execute a work of art for another, much as the value of the skill might exceed that of the materials, the contract would have been nevertheless for the sale of a chattel.

§ 117. *In reviewing these decisions, it is surprising to find that a rule so satisfactory and apparently so obvious as that laid down in *Lee v. Griffin*, in 1861, should not have been earlier suggested by some of the eminent judges who had been called on to consider the subject, beginning with Lord Ellenborough, in 1814, and closing with Pollock C. B. in 1856. From the very definition of a sale, the rule would seem to be at once deducible, *that if the con-*

den *v. Wilson*, 33 Up. Can. Q. B. (Finney *v. Aggar*, 31 N. J. L. (2 Vr. 442); but is rejected in New Jersey 386).

tract is intended to result in transferring for a price from B to A a chattel in which A had no previous property, it is a contract for the sale of a chattel, and unless that be the case, there can be no sale. In several of the opinions this idea was evidently in the minds of the judges. Especially was this manifest in the decision of Bayley J. in *Atkinson v. Bell*, and Tindal C. J. in *Grafton v. Armitage*; but it was not clearly and distinctly brought into view before the decision in *Lee v. Griffin*. The same tentative process for arriving at the proper distinctive test between these two contracts has been gone through in America, but without a satisfactory result, as will subsequently appear.

§ 118. The principles suggested as affording a test on this subject prior to the case of *Lee v. Griffin* were the following:—

1st. That if the subject-matter of the contract was not in existence, not *in rerum naturâ*, as Lord Ellenborough expressed it, the contract was not “for the sale of goods.” This was the opinion of Lord Ellenborough in *Groves v. Buck*;¹ of Abbott C. J. as shown by his comment on *Towers v. Osborne*, in the opinion delivered in *Garbutt v. Watson*;² and may be inferred from *Rondeau v. Wyatt*³ to have been the opinion of Lord Loughborough.

That the decision in *Towers v. Osborne* was wrong⁴ if it went upon the ground that Lord Loughborough states, viz., that the order for the chariot was not a contract or agreement for the sale of a chattel, is no longer questionable.⁵ The familiar example put by the judges in several of the cases, of an order to a tailor or shoemaker for a garment or pair of shoes, both of which are treated as undoubted

¹ 3 M. & S. 178.

² 5 B. & A. 613.

³ 2 H. Bl. 63.

⁴ Several well-considered American cases are based upon the same ground as *Towers v. Osborne*. See *Abbott v. Gilchrist*, 38 Me. 260; *Cummings v. Dennett*, 26 Me. 397; *Hight v. Ripley*, 19 Me. 137; *Goddard v. Binney*, 115 Mass. 450; *Spencer v. Cone*, 42 Mass. (1 Metc.) 283; *Mixer v. Howarth*, 38

Mass. (21 Pick.) 205; s. c. 32 Am. Dec. 256; *Mead v. Case*, 33 Barb. (N. Y.) 202; *Donovan v. Wilson*, 26 Barb. (N. Y.) 138; *Sewall v. Fitch*, 8 Cow. (N. Y.) 215; *Crookshank v. Burrell*, 18 Johns. (N. Y.) 58; s. c. 19 Am. Dec. 187; *Robertson v. Vaughn*, 5 Sandf. (N. Y.) 1.

⁵ As to the American doctrine on this point, *vide ante*, § 107, note 1.

cases * of contracts for the sale of chattels, is exactly [*100] the same as the order in *Towers v. Osborne*. The intention of the parties was that the result should be a transfer for a price, by *Towers* to Sir John Osborne, of a chattel in which Sir John had no previous property, and this was clearly a contract for a sale.

§ 119. 2d. The second principle suggested as the true test was by Bayley J. first in *Smith v. Surman*,¹ afterwards more fully developed in *Atkinson v. Bell*,² viz., that if the materials be furnished by the employer, the contract is for work and labor, not for a sale; but if the material be furnished by the workman who makes up a chattel, he cannot maintain "work and labor," because his labor was bestowed on his own materials and for himself, and not for the person who employed him. The first branch of this rule is undoubtedly correct, as shown by the principles settled in *Lee v. Griffin*, because where the materials are furnished by the employer, there can be no transfer to him of the property in the chattel, he being previously possessed of the title to the materials, so that nothing *can* be due from him save compensation for labor; and this will be equally true where the employer has furnished only part of the materials, for the contract in such case cannot result in a sale to him of what is already his, and the only other action possible would be for work and labor done, and materials furnished. But the second part of the rule is inaccurate, as pointed out in *Grafton v. Armitage* and *Lee v. Griffin*. A man may be responsible for damage done to another's chattel, as, for example, to a coachmaker's vehicle, and may employ the latter to repair the injury, in which case an action would plainly lie against the employer for the work and labor done, and materials furnished by the coachbuilder, although bestowed on a thing which is his, and is to remain his after being repaired at another's expense.

§ 120. 3d. The third attempt to supply the true test on this matter, previously to its satisfactory settlement in *Lee v. Griffin*, was made by Pollock C. B. in *Clay v. Yates*.¹

¹ 9 B. & C. 568. ² 10 B. & C. 277. ¹ 25 L. J. Ex. 237; 1 H. & N. 73.

[*101] *The proper rule, in his opinion, is this, "Whether the work and labor is of the essence of the contract, or whether it is the materials that are found." This test was decisively rejected by Crompton and Blackburn JJ. in *Lee v. Griffin*. It cannot be supported, even in the extreme case put by Martin B., of a portrait worth 300 guineas on a canvas worth 10s. If the employer owned nothing whatever that went into the composition of the picture — if neither materials, nor skill, nor labor, were supplied by him, it is obvious that he cannot get title to the picture or any property in it, except through a transfer of the chattel to him by the artist for a price, and this is in law a contract of sale. It cannot make the slightest difference in what proportions the elements that compose the chattel, namely, the raw material and the skill, are divided; it is not the less true, that none of these elements were owned by the employer before the contract, and that the chattel composed of them is by the terms of the contract to be transferred for a price by the former owner to the employer. The test suggested by Martin B. in his opinion as found in the Law Journal Report, is accurate as far as it goes, but it does not cover more than the point in the case before the Court. The learned Baron said: "Suppose the plaintiff had brought an action to recover the value of that which he had delivered, would that be the value of the book? I apprehend not, for the book might not be worth half the value of the paper it was written on." This is true, and why? Because a part of the materials of the book — its chief materials, indeed — to wit, the composition, had been furnished by the employer, belonged to him already, and therefore *could* not be sold to him by the printer. The only remedy then remaining was an action for work and labor and materials.

§ 121. Cases are sometimes put, as a test of principles, that are so extreme as to be best disposed of by the application of the familiar rule, "*de minimis non curat lex*." Thus the example of an attorney employed to draw a deed, is dismissed by Blackburn J. in *Lee v. Griffin*, with the simple remark that it is an abuse of language to say that the paper or

parchment *are goods sold and delivered. So, if a [*102] man send a button or a skein of silk to be used in making a coat, it would be mere trifling to say that he was part owner of the materials, and that an action for goods sold would not therefore lie in favor of the tailor who furnished the garment. Such matters cannot be considered as having entered into the contemplation of parties when contracting, nor as forming any real part of the consideration for the mutual stipulations.

§ 122. Where a contract is made for furnishing a machine or a movable thing of any kind and *fixing it to the freehold*, it is not a contract for the sale of goods. In such contracts the intention is plainly not to make a sale of movables, but to make improvements on the real property, and the consideration to be paid to the workman is not for a transfer of chattels, but for work and labor done and materials furnished in adding something to the land.¹

[And the same rule applies when the substance of the contract is to make improvements to a chattel already in existence, *e.g.* to make and fix boilers to a ship.²]

§ 123. In America, as before observed, the same perplexity has been exhibited as marks the history of the subject in our own law, and in *Lamb v. Crafts*,¹ Chief Justice Shaw said:

1 *Cotterell v. Apsley*, 6 Taunt. 322; *Tripp v. Armitage*, 4 M. & W. 687; *Clark v. Bulmer*, 11 M. & W. 243; *Courtwright v. Stewart*, 19 Barb. (N. Y.) 455; *Phipps v. McFarlane*, 3 Minn. 109.

Machinery attached to freehold.—The Supreme Court of Ohio say in the recent case of *Case Manufacturing Co. v. Garven*, 45 Ohio St.; s. c. 11 West. Rep. 283, that the machinery of a manufactory which supplies the motive power,—as the engine, boiler, and their usual attachments,—as contradistinguished from that propelled by it, where permanently annexed to foundations resting upon the freehold, is generally held to be a fixture,

though susceptible of being removed without any material injury to the same or the freehold; and whilst, by the agreement of the parties, the property may be made to present the character of personalty, yet where it is so attached that but for the agreement it would be a fixture, such agreement will be of no avail against a subsequent mortgagee of the realty, without notice of it; nor will the filing of a mortgage upon it as chattel property, duly executed and delivered as such, of itself constitute such notice.

² *Anglo-Egyptian Navigation Company v. Rennie*, L. R. 10 C. P. 271.

¹ 53 Mass. 12 Metc. 356. See, also, the case of *Smith v. The N. Y. Cen-*

"The distinction, we believe, is now well understood. When a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale and not a contract for labor; otherwise when the article is made pursuant to the agreement." This opinion seems to have been deduced from some observations of Abbott C. J. in *Garbutt v. Watson*, and rests on no satisfactory principle. Mr. Story, whose treatise in the edition of 1862 contains no reference to the then recent case of *Lee v. Griffin*, avows his difficulty, *and suggests that it would probably be held "that where the labor and service were the essential considerations, as in the case of the manufacture of a thing not *in esse*, the contract would not be within the statute; where the labor and service were only incidental to a subject-matter *in esse*, the statute would apply."² This is the rule suggested by Pollock C. B. in *Clay v. Yates*, and rejected in *Lee v. Griffin*.

In Mr. Hilliard's *Treatise on Sale*, the contradictory decisions are given without any attempt on the part of the learned author to reconcile them or deduce any general principles applicable to the controverted question.³

§ 124. [The rules adopted by the Courts of the different states for determining whether a contract is one of sale or for work and labor directly conflict with one another; and it will suffice to mention that in Massachusetts the established rule is based upon the distinction referred to by Shaw C. J. in *Lamb v. Crafts* (*supra*), and in the most recent case on the subject in that state the rule was defended on the ground of its justice and convenience, while the rule laid down in *Lee v. Griffin* was referred to but not followed.¹ On the other hand, in New York and some of the other states of the Union, the distinction is taken between an agreement for the sale and delivery at a future day of articles then existing, and

tral Railroad Company, 4 Keyes (N. Y.) 180, in which all the authorities are reviewed.

² Story on Sales, § 260 c. See, however, note to 4th edition (1871).

³ Hilliard on Sales, pp. 464-7.

¹ *Goddard v. Binney*, 115 Mass. 450.

an agreement to sell and deliver articles not then manufactured, but to be made afterwards; the Courts holding that the latter are contracts for work and labor and materials found, and not within the statute.² This is the principle which was adopted by some of the English judges in cases prior to *Lee v. Griffin*, among others by Abbott C. J. in *Garbutt v. Watson*. In a recent case in the state of New Hampshire,³ the rule of distinction as laid by Blackburn J. in *Lee v. Griffin* was cited with approval, and apparently followed.]

§ 125. * It was at one time questioned whether [*104] sales of goods by public auction were embraced within the statute. Lord Ellenborough's strong *dicta* in *Hinde v. Whitehouse*,¹ in 1806, seem to have put an end to the doubt, and the authority of that case was recognized in *Kenworthy v. Schofield*;² so that the question suggested on this point by Lord Mansfield, in *Simon v. Motivos*,³ has long been at rest.⁴

² *Pitkin v. Noyes*, 48 N. H. 294; s. c. 2 Am. Rep. 218; *Crookshank v. Burrell*, 18 Johns. (N. Y.) 58. See, also, authorities cited *ante*, sec. 110, note 2.

³ *Prescott v. Locke*, 51 N. H. 94; s. c. 12 Am. Rep. 55.

¹ 7 East, 558.

² B. & C. 945.

³ 2 Burr. 1921, and 1 W. Bl. 599.

⁴ *People v. White*, 6 Cal. 75; *Bozza v. Rowe*, 30 Ill. 198; *Baker v. Jamieson*, 2 J. J. Marsh. (Ky.) 547; *O'Don-*

nell v. Leeman, 43 Me. 158, 160; s. c. 69 Am. Dec. 54; *Pike v. Balch*, 38 Me. 302, 310; s. c. 61 Am. Dec. 248; *Morton v. Dean*, 54 Mass. (13 Metc.) 385; *Davis v. Rowell*, 19 Mass. (2 Pick.) 64; s. c. 13 Am. Dec. 398; *Jenness v. Wendell*, 51 N. H. 63; s. c. 12 Am. Rep. 48; *Johnson v. Buck*, 35 N. J. L. (6 Vr.) 338; s. c. 10 Am. Rep. 243; *Baltzen v. Nicolay*, 53 N. Y. 467; *Tallman v. Franklin*, 14 N. Y. 584; *Witham v. Smith*, 5 Grant (Ont.) 203; 2 Kent Com. 539.

[*105]

* CHAPTER II.

WHAT ARE GOODS, WARES AND MERCHANDISE.

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§ 126. THE 17th section of the statute applies to contracts for the sale of "goods, wares, and merchandise," words which comprehend all corporeal movable property.

The statute, therefore, does not apply to shares, stocks, documents of title, choses in action, and other incorporeal rights and property.¹ The following cases have been decided on this point:

¹ "Goods, wares and merchandise."
— The words, "goods, wares and merchandise," are held to include not only visible and tangible, but also incorporeal property, choses in action (*Mayor v. Child*, 47 Cal. 142; *Bibend v. Liverpool & L. Insurance Co.*, 30 Cal. 78; *North v. Forest*, 15 Conn. 400. See *Beers v. Crowell*, *Dudley* (Ga.) 29. But in New York the statutes require all contracts for sale of choses in action to be writing. See *Truax v. Slater*, 86 N. Y. 630; *Peabody v. Speyers*, 56 N. Y. 230; *Allen v. Aguirre*, 7 N. Y. 543; s. c. 10 Barb. (N. Y.) 74; *Kessel v. Albertis*, 56 Barb. (N. Y.) 362; *Hagar v.*

King, 38 Barb. (N. Y.) 200; *Artcher v. Zeh*, 5 Hill (N. Y.) 200; R. S. of N. Y., Pt. II., ch. 7, sec. 3, vol. 3, p. 2228 (7th ed.). It is said that a fair construction of the word "goods" is to limit it "to such personal property, other than wares and merchandise, as are usually transferred by sale and delivery; and whatever else may be included, do not extend to a chose in action, a right of authority to demand or receive money, a security or the evidence of debt"), accounts (*Walker v. Supple*, 54 Ga. 178), checks (*Beers v. Crowell*, *Dudley* (Ga.) 28), bank bills (*Gooch v. Holmes*, 41 Me. 523, 528; *Riggs v.*

The statute does not apply to a sale of shares in a joint stock banking company, *Humble v. Mitchell*;²

² 11 A. & E. 205.

Magruder, 2 Cr. C. C. 143), promissory notes (*Pray v. Mitchell*, 60 Me. 430, 435. See *Gooch v. Holmes*, 41 Me. 523; *Baldwin v. Williams*, 44 Mass. (3 Metc.) 365; *Clapp v. Shephard*, 40 Mass. (23 Pick.) 228; *Mills v. Gore*, 37 Mass. (20 Pick.) 28; *Riggs v. Magruder*, 2 Cr. C. C. 143; *contra*, *Hudson v. Weir*, 29 Ala. 294, 298; *Whittemore v. Gibbs*, 24 N. H. 485, citing *Magee v. Billingsley*, 3 Ala. 679; *Crawford v. Smith*, 7 Dana (Ky.) 60; *Everit v. Strong*, 5 Hill (N. Y.) 163; *Ford v. Stuart*, 19 Johns. (N. Y.) 342; *Dawson v. Coles*, 16 Johns. (N. Y.) 51; *Waterman v. Williamson*, 13 Ired. (N. C.) L. 198; *Murchison v. White*, 8 Ired. (N. C.) L. 53; *Tucker v. Daly*, 7 Gratt. (Va.) 330; *Mandeville v. Welch*, 18 U. S. (5 Wheat.) 277; bk. 4, L. ed. 80; *Masters v. Miller*, 4 T. R. 340; *Bloxam v. Sanders*, 4 Barn. & Cress. 941; *Mogg v. Baker*, 3 Mees. & W. 195. But in those states in which the statute has the word "goods" only promissory notes will not be included. *Whittemore v. Gibbs*, 24 N. H. 485), gold where it is the subject of contract and sale (*Peabody v. Speyers*, 56 N. Y. 230), and corporate stocks (*North v. Forest*, 15 Conn. 400; *Southern Life and Trust Co. v. Cole*, 4 Fla. 359; *Pray v. Mitchell*, 60 Me. 430; *Colvin v. Williams*, 3 Har. & J. (Md.) 38; s. c. 5 Am. Dec. 417; *Somerby v. Buntin*, 118 Mass. 279; s. c. 19 Am. Rep. 459; *Thompson v. Alger*, 53 Mass. (12 Metc.) 428; *Baldwin v. Williams*, 44 Mass. (3 Metc.) 365; *Tisdale v. Harris*, 37 Mass. (20 Pick.) 9; *Weightman v. Caldwell*, 17 U. S. (4 Wheat.) 89; bk. 4, L. ed. 521); but it is held that a contract to sell shares in a company not yet organized is not within the statute. See *Green v. Brookins*, 23

Mich. 48; s. c. 9 Am. Rep. 74; *Gadsden v. Lance*, 1 McMull. (S. C.) Eq. 87; s. c. 37 Am. Dec. 548. In *Pray v. Mitchell*, *supra*, the court say that "joint companies have become so numerous and so large an amount of the property of the community is now invested in them, and as the original indicia of property arising from delivery and possession cannot take place, there seems to be peculiar reasons for extending the provision of the statute to these; that the words 'goods' and 'merchandise' may properly include stock or shares in such companies; and as contracts for the sale of such stock is clearly within the mischief which the statute was designed to prevent, they ought to be held within its letter and spirit. But there is some conflict in the decisions of the courts upon this point. *Boardman v. Cutter*, 128 Mass. 388; *Somerby v. Buntin*, 118 Mass. 279; s. c. 19 Am. Rep. 459. But the words of the statute have never been so extended as to include an incorporeal right or franchise granted by the government securing to the inventor and his assigns the exclusive right to make, use and vend the articles patented; or a share in that right which has no separate or distinct existence at law until created by the instrument of assignment. See *Somerby v. Buntin*, 118 Mass. 279; s. c. 19 Am. Rep. 459; *Blakeney v. Goode*, 30 Ohio St. 350; *Chanter v. Dickinson*, 6 Scott, N. R. 182; s. c. 5 Man. & Gr. 253.

In some states the statute includes only the word "goods" (*Vawter v. Griffin*, 40 Ind. 600; *Whittemore v. Gibbs*, 24 N. H. 485), while in others the statute expressly adds "things in action" to the phrase, "goods, wares, and merchandise." *Peabody v. Speyers*, 56 N. Y. 230; *People v.*

Nor to a sale of stock of a foreign state, *Heseltine v. Siggers*;⁸

Nor to a sale of railway shares, *Tempest v. Kilner*,⁴ *Bowlby v. Bell*,⁵ *Bradley v. Holdsworth*,⁶ and *Duncroft v. Albrecht*;⁷

Nor to a sale of shares in a mining company on the cost-book principle, *Watson v. Spratley*,⁸ *Powell v. Jessop*;⁹

[Nor to a sale of tenant's fixtures, *Lee v. Gaskell*.¹⁰]

[*106] § 127. * Most of the foregoing decisions went upon the ground that the sales were of choses in action, not property embraced in the words "goods, wares, and merchandise,"¹ but some turned upon other enactments, to which it will now be convenient to refer. These are, *first*, the 4th section of the Statute of Frauds, and *secondly*, the exemption in the Stamp Act, of agreements relating to the sale of goods, wares, and merchandise.

§ 128. The 4th section¹ of the Act of 29 Car. II. c. 3, enacts, "that no action shall be brought whereby to charge

Beebe, 1 Barb. (N. Y.) 379; *Artcher v. Zeh*, 5 Hill (N. Y.) 200; 2 N. Y. Rev. Stat. 136, sec. 3.

English rule. — It is well settled in England that contracts for the sale of shares and stocks, notes, checks, bonds, and evidences of value, are not within the 17th section of Charles II. See *Humble v. Mitchell*, 11 Ad. & E. 205; s. c. 8 Per. & D. 141; *Pawle v. Gunn*, 4 Bing. N. C. 445; *Bowlby v. Bell*, 3 C. B. 284; *Tempest v. Kilner*, 3 C. B. 249; *Heseltine v. Siggers*, 1 Ex. 856; *Watson v. Spratley*, 10 Ex. 222; *Canter v. Dickinson*, 5 Man. & Gr. 253; *Bradley v. Holdsworth*, 3 Mees. & W. 422; *Mussell v. Cooke*, Preced. Ch. 533; *Crull v. Dodson*, Sel. Cas. Ch. 41; *Duncroft v. Albrecht*, 12 Sim. 189. See, also, *Vaupell v. Woodward*, 2 Sandf. Ch. (N. Y.) 143.

⁸ 1 Ex. 856.

⁴ 3 C. B. 249.

⁵ 3 C. B. 284.

⁶ 3 M. & W. 422.

⁷ 12 Sim. 189.

⁹ 10 Ex. 222, and 24 L. J. Ex. 53.

⁹ 18 C. B. 336, and 25 L. J. C. P. 199.

¹⁰ 1 Q. B. D. 700.

¹ Although the word "goods" alone is used in the seventh section of the Indiana Statute of Frauds, — which corresponds to the seventeenth section of the English statute, — the legal effect of the statute is said to remain the same. *Vawter v. Griffin*, 40 Ind. 593.

¹ It was held in *Leroux v. Brown*, 12 C. B. 801, and 22 L. J. C. P. 1, that this section is applicable to a contract made in a foreign country. See remarks on this case by Willis J. in *Gibson v. Holland*, L. R. 1 C. P. 1; 35 L. J. C. P. 5; and *per eundem* in *Williams v. Wheeler*, 8 C. B. N. S. 299, 316.

Transfer of property in another state. — *Lex loci rei citus.* — We have seen (*ante*, sec. 104, note 2) that contracts respecting personal property are governed by the *lex loci contractus*; however, sometimes the *citus* of the property is an important consideration. *Ballard v. Winter*, 39 Conn. 179; *Coote v. Jecks*, L. R. 13

any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person;² or to

Eq. 597. Respecting the effect which will be given in this country to the transfer of personal property of persons abroad in another country, see *Baltimore & Ohio R. R. Co. v. Glenn*, 28 Md. 287, 322, 323; *Suit v. Woodhall*, 113 Mass. 391, 394; *Kline v. Baker*, 99 Mass. 253, 254; *Finch v. Mansfield*, 97 Mass. 89; *Orcutt v. Nelson*, 67 Mass. (1 Gray) 536; *Hill v. Spear*, 60 N. H. 253; s. c. 9 Am. Rep. 205; *Hall v. Costello*, 48 N. H. 176; s. c. 2 Am. Rep. 207.

² *Promise to answer for the debt, default or miscarriage of another person.*—This provision does not prevent one person from buying goods of another and delivering them to a third, but if the person to whom the goods are delivered is responsible to the seller, the transaction will be within the statute. See *Clay v. Walton*, 9 Cal. 334; *Doyle v. White*, 26 Me. 341; s. c. 45 Am. Dec. 110; *Nelson v. Boynton*, 44 Mass. (3 Metc.) 396; s. c. 37 Am. Dec. 148; *Hetfield v. Dow*, 27 N. J. L. (3 Dutch.) 440; *Browne on Stat. of Frauds*, sec. 197. Respecting a guarantee by a third person to pay the debt of another, see *Brown v. Curtiss*, 2 N. Y. 234; *Seaman v. Hasbrouck*, 35 Barb. (N. Y.) 151; *Hale v. Broadman*, 27 Barb. (N. Y.) 85; *Mallory v. Gillett*, 23 Barb. (N. Y.) 616; *Barnes v. Perine*, 15 Barb. (N. Y.) 253; *Kingsley v. Balcome*, 4 Barb. (N. Y.) 133; *Blunt v. Boyd*, 3 Barb. (N. Y.) 212; *State Bank v. Mettler*, 2 Bosw. (N. Y.) 398; *Cleveland v. Farley*, 9 Cow. (N. Y.) 639; *Farley v. Cleveland*, 4 Cow. (N. Y.) 432; s. c. 15 Am. Dec. 387; *Barker v. Bucklin*, 2 Den. (N. Y.) 45; s. c. 43 Am. Dec. 726; *Stoddard v. Graham*, 23 How. (N. Y.) Pr. 532; *New York & E. R. R. Co. v. Gilchrist*,

16 How. (N. Y.) Pr. 566; *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 29; s. c. 5 Am. Dec. 317; *Connor v. Williams*, 2 Robt. (N. Y.) 49; *Phillips v. Gray*, 3 E. D. Smith (N. Y.) 70; *Stern v. Drinker*, 2 E. D. Smith (N. Y.) 404; *Watson v. Randall*, 20 Wend. (N. Y.) 201; *Rogers v. Kneeland*, 13 Wend. (N. Y.) 122; *Marquand v. Hipper*, 12 Wend. (N. Y.) 520; *Meech v. Smith*, 7 Wend. (N. Y.) 318; *Elwood v. Monk*, 5 Wend. (N. Y.) 237; *Skinner v. Conant*, 2 Vt. 453; s. c. 21 Am. Dec. 554. Consequently, where goods are sold to one person, solely on his credit, and at his direction delivered to a third, such purchaser will be liable. *Hartley v. Varner*, 88 Ill. 561; *Schoenfeld v. Brown*, 78 Ill. 487; *Wills v. Ross*, 77 Ind. 1; s. c. 40 Am. Rep. 279; *Johnson v. Hoover*, 72 Ind. 395; *Morrison v. Baker*, 81 N. C. 76; *Oothaut v. Leahy*, 23 Wis. 114; *Thayer v. Gallup*, 13 Wis. 539; *Turton v. Burke*, 4 Wis. 119.

A factor's promise to 'guarantee sales made under a del credere commission is not within the statute.

Charge on books of vendor to the person to whom the goods are delivered is but presumptive evidence that the goods were sold to him. *Ruggles v. Gatton*, 50 Ill. 412; *Barrett v. McHugh*, 128 Mass. 165; *Heywood v. Stiles*, 124 Mass. 275; *Swift v. Pierce*, 95 Mass. (13 Allen) 136; *Walker v. Richards*, 41 N. H. 388; *Foster v. Persch*, 68 N. Y. 400; *Meeker v. Claghorn*, 44 N. Y. 352; *Hazen v. Bearden*, 4 Sneed. (Tenn.) 48; *Champion v. Doty*, 31 Wis. 190. See, also, *Larson v. Wyman*, 14 Wend. (N. Y.) 246; *Keate v. Temple*, 1 Bos. & Pul. 158; *Simpson v. Penton*, 2 Crompt. & M. 430; *Anderson v. Hayman*, 1 H. Bl. 120.

charge any person upon any agreement made upon consideration of marriage; *or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them*; or upon any agreement that is not to be performed within the space of one year from the making thereof,³ unless

Promise to pay assumed debt.—Barringer v. Warden, 12 Cal. 311; Indiana Manuf. Co. v. Porter, 75 Ind. 428; Beardslee v. Morgner, 4 Mo. App. 139; Whitbeck v. Whitbeck, 9 Cow. (N. Y.) 266; s. c. 18 Am. Dec. 503; Leonard v. Vredenburg, 8 Johns. (N. Y.) 29; s. c. 5 Am. Dec. 317; Estabrook v. Gebhardt, 32 Ohio St. 415; Townsend v. Long, 77 Pa. St. 143; Landis v. Royer, 59 Pa. St. 95. See Uhler v. Farmers' National Bank, 64 Pa. St. 406; Whitcomb v. Kephart, 50 Pa. St. 85; Arnold v. Stedman, 45 Pa. St. 186; Stoudt v. Hine, 45 Pa. St. 30; Malone v. Keener, 44 Pa. St. 107. It is a general rule that where the promise to pay the debt of another arises out of a new and original consideration of benefit or harm, by the newly contracted parties, it is valid. Clifford v. Lühring, 69 Ill. 402; Wills v. Brown, 118 Mass. 138; Ames v. Foster, 106 Mass. 403; Burr v. Wilcox, 95 Mass. (13 Allen) 273; Jepherson v. Hunt, 84 Mass. (2 Allen) 423; Alger v. Scoville, 67 Mass. (1 Gray) 397; Nelson v. Boynton, 44 Mass. (3 Metc.) 396; s. c. 37 Am. Dec. 148; Furbish v. Goodnow, 98 Mass. 300; Anderson v. Davis, 9 Vt. 136; s. c. 31 Am. Dec. 612; Piatt v. United States, 89 U. S. (22 Wall.) 506; bk. 22, L. ed. 858; Stewart v. Hinkle, 1 Bond. C. C. 506.

³ *A contract of sale to be performed within a year* is not within the statute (Walker v. Johnson, 96 U. S. (6 Otto) 424; bk. 24, L. ed. 834; Mcpherson v. Cox, 96 U. S. (6 Otto) 404; bk. 24, L. ed. 746; Peter v. Compton, Skin. 353); consequently contracts which may be performed within a year are not within the statute. Riddle v. Backus, 38 Iowa,

81; Somerby v. Buntin, 118 Mass. 279; s. c. 19 Am. Rep. 459; Roberts v. Rockbottom Co., 48 Mass. (7 Metc.) 47; Kent v. Kent, 35 Mass. (18 Pick.) 569; Blakeney v. Goode, 30 Ohio St. 350, 365; White v. Hanchett, 21 Wis. 415; Wells v. Horton, 4 Bing. 40. But see Patten v. Hicks, 43 Cal. 509; Washington, etc., Steam Packet Co. v. Sickles, 72 U. S. (5 Wall.) 580; bk. 18, L. ed. 550. See, also, Birch v. Liverpool, 9 Barn. & Cres. 392; Dobson v. Espie, 2 Hurl. & N. 81. Thus where a contract is for the performance of an act on the death of one of the parties (Frost v. Tarr, 53 Ind. 390; Bell v. Hewitt's Ex'rs, 24 Ind. 280; Hill v. Jamieson, 16 Ind. 125; s. c. 79 Am. Dec. 414), or which may be determined and completed by the death of either party (Doyle v. Dixon, 97 Mass. 208. See Worthy v. Jones, 77 Mass. (11 Gray) 168; s. c. 71 Am. Dec. 696; Hill v. Hooper, 67 Mass. (1 Gray) 131; Lyon v. King, 52 Mass. (11 Metc.) 411; s. c. 45 Am. Dec. 219), and contracts which may or may not be performed within a year are not within the statute. Duff v. Snider, 54 Miss. 247; Blakeney v. Goode, 30 Ohio St. 350; Thomas v. Hammond, 47 Tex. 42; Walker v. Johnson, 96 U. S. (6 Otto) 424; bk. 24, L. ed. 834; Mcpherson v. Cox, 96 U. S. (6 Otto) 404; bk. 24, L. ed. 746. See Clark v. Pendleton, 20 Conn. 495; Russell v. Slade, 12 Conn. 455; Bell v. Hewitt, 24 Ind. 280; Howard v. Burgen, 4 Dana (Ky.) 137; Ellicott v. Peterson, 4 Md. 476; Doyle v. Dixon, 97 Mass. 20; Blake v. Cole, 39 Mass. (22 Pick.) 97; Peters v. Westborough, 36 Mass. (19 Pick.) 364; s. c. 3 Am. Dec. 124; Kent v. Kent, 35 Mass. (18 Pick.) 569; Foster v. McO'Brien, 18 Mo.

the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

The Stamp Act, 55 Geo. III. c. 184, in the schedule (re-enacted in the Stamp Act, 1870), title "Agreements," exempts from stamp duties every "memorandum, letter, or agreement, made for or relating to the sale of any goods, wares, or merchandise."

§ 129. It is often important to determine whether a sale of certain articles attached to the soil, such as fixtures and growing crops, is governed by the 17th section as being a sale of "goods, wares, and merchandise," or by the 4th section, as a sale of an "interest in or concerning land."

Though *these two sections, on a cursory perusal, [*107] might seem to be substantially the same, both re-

88; *Gault v. Brown*, 48 N. H. 183; *Emery v. Smith*, 46 N. H. 151; *Esty v. Aldrich*, 46 N. H. 127; *Updike v. Ten Broeck*, 32 N. J. L. (3 Vr.) 105; *Kent v. Kent*, 62 N. Y. 560; s. c. 20 Am. Dec. 502; *Trustees v. Brooklyn Fire Ins. Co.*, 28 N. Y. 153; s. c. 19 N. Y. 305; *Dresser v. Dresser*, 35 Barb. (N. Y.) 573; *McKinney v. McKinney*, 8 Daly (N. Y.) 368; *Breadwell v. Getman*, 3 Den. (N. Y.) 87; *Artcher v. Zeh*, 5 Hill (N. Y.) 200; *Lockwood v. Barnes*, 3 Hill (N. Y.) 12; s. c. 38 Am. Dec. 620; *Kellogg v. Clark*, 23 Hun (N. Y.) 393; *Smith v. Conlin*, 19 Hun (N. Y.) 234; *Moore v. Fox*, 10 Johns. (N. Y.) 244; s. c. 33 Am. Dec. 633; *Plimpton v. Curtiss*, 15 Wend. (N. Y.) 336; *McLees v. Hale*, 10 Wend. (N. Y.) 426; *Bissell v. Bissell*, 4 Week. Dig. (N. Y.) 338; *Thouvenin v. Lea*, 26 Texas, 612; *Sherman v. Champlain Trans. Co.*, 31 Vt. 162; *Heath v. Heath*, 31 Wis. 223; *Jilson v. Gilbert*, 26 Wis. 637; s. c. 7 Am. Dec. 100; *Souch v. Strawbridge*, 2 C. B. 808; *Fenton v. Embler*, 3 Burr. 1278; *Gilbert v. Sykes*, 16 East, 150.

English doctrine.—The doctrine that Statute of Frauds, respecting contracts not to be performed within a year, applies only to contracts not to be performed on either side within that time (see *Donellan v. Read*, 3 Barn. & Ad. 890; *Cherry v. Heming*, 4 Ex. 631) has been adopted in some of the states. See *Smalley v. Greene*, 52 Iowa, 241; s. c. 35 Am. Rep. 267; *Blair Town Lot and Land Co. v. Walker*, 39 Iowa, 406; *Riddle v. Backus*, 38 Iowa, 81. Thus a sale of chattels, accompanied by delivery, payment for which is not to be made within a year, is held not to be within the statute. *Rake v. Pope*, 7 Ala. 161.

But where a contract distinctly shows that it was to extend over a year, for however short a period, it is void even to the partly performed within a year. *Scoggin v. Blackwell*, 36 Ala. 351; *Kelly v. Terrill*, 26 Ga. 551; *Comstock v. Ward*, 22 Ill. 248; *Herrin v. Butters*, 20 Me. 119; *Hinckley v. Southgate*, 11 Vt. 428; *Cherry v. Heming*, 4 Ex. 631.

quiring some written note or memorandum, signed by the party to be charged, a more attentive consideration will show very material distinctions. Agreements under the 4th section require a written note or memorandum, under all circumstances, and for any amount or value. But under the 17th section, the necessity for the writing does not exist when the value is under 10*l*, and it may be dispensed with in contracts for larger sums, by proof of part acceptance or part payment by the buyer, or by the giving of something in earnest to bind the bargain. Again, a contract for sale under the 17th section is exempt from stamp duty, but if the agreement be for a sale of any "interest in or concerning land," a stamp is required. Practically, therefore, the whole controversy between the parties to an action is often finally disposed of by this test.

§ 130. Complaint has been made at different times of the unsatisfactory character of the decisions in which the Courts have sought to establish rules distinguishing with accuracy and certainty, whether a contract for the sale of things attached to the soil is or is not a sale of an interest in land within the 4th section. Lord Abinger, in 1842, gave expression to this complaint in a somewhat exaggerated form when he said, "It must be admitted, taking the cases altogether, that no general rule is laid down by any one of them, that is not contradicted by some other."¹

§ 131. Before entering upon an examination of the decisions, it will conduce to a proper understanding of the subject to transcribe in full the remarks of Lord Blackburn on the general principles of law involved in the question.

"The statutes are now applicable to all contracts for the sale of 'goods, wares and merchandise,' words which, as has been already said, comprehend all tangible movable property; I say movable property, for things attached to the soil are not goods, though when served from it they are; thus, growing trees are part of the land, but the cut logs [*108] are goods; *and so, too, bricks or stones which are goods, cease to be so when built into a wall,—they

¹ *Rodwell v. Phillips*, 9 M. & W. 505.

then become a part of the soil. Fixtures, and those crops which are included amongst emblements, though attached to the soil, are not for all purposes part of the freehold."¹

¹ *Fixtures* which are incident to the land used in connection therewith, although temporarily detached notwithstanding an oral reservation at the time of making the deed (Brock v. Smith, 14 Ark. 431; Parsons v. Camp, 11 Conn. 525; McLaughlin v. Johnson, 46 Ill. 163; Smith v. Price, 39 Ill. 28; Palmer v. Forbes, 23 Ill. 301; Redlon v. Barker, 4 Kan. 445; Fulton v. Norton, 64 Me. 410; Trull v. Fuller, 28 Me. 545; Lassell v. Reed, 6 Me. (6 Greenl.) 222; Farrar v. Stackpole, 6 Me. (6 Greenl.) 157; s. c. 19 Am. Dec. 201; Winslow v. Merchants' Ins. Co., 45 Mass. (4 Metc.) 306; s. c. 38 Am. Dec. 368; Daniels v. Pond, 38 Mass. (21 Pick.) 367; s. c. 32 Am. Dec. 269; Noble v. Bosworth, 36 Mass. (19 Pick.) 314; Glidden v. Bennett, 43 N. H. 306; Wadleigh v. Janvrin, 41 N. H. 503; s. c. 77 Am. Dec. 780; Sawyer v. Twiss, 26 N. H. 346; Needham v. Allison, 24 N. H. (4 Fost.) 355; Conner v. Coffin, 22 N. H. 542; Kittredge v. Woods, 3 N. H. 503; s. c. 14 Am. Dec. 393; Snedeker v. Warring, 12 N. Y. 170; Bishop v. Bishop, 11 N. Y. 123; s. c. 62 Am. Dec. 68; Austin v. Sawyer, 9 Cow. (N. Y.) 39; Raymond v. White, 7 Cow. (N. Y.) 319; Miller v. Plumb, 6 Cow. (N. Y.) 665; s. c. 16 Am. Dec. 456; Goodrich v. Jones, 2 Hill (N. Y.) 142; Cresson v. Stout, 17 Johns. (N. Y.) 116; s. c. 8 Am. Dec. 373; Heermance v. Vernoy, 6 Johns. (N. Y.) 5; Walker v. Sherman, 20 Wend. (N. Y.) 636; Middlebrook v. Corwin, 15 Wend. (N. Y.) 169; Bond v. Coke, 71 N. C. 97; Latham v. Blakely, 70 N. C. 368; Meig's Appeal, 62 Pa. St. 28; s. c. 1 Am. Rep. 372; Hill v. Sewald, 53 Pa. St. 271; Voorhis v. Freeman, 2 Watts & S. (Pa.) 116; s. c. 37 Am. Dec. 490; Ripley v. Paige, 12 Vt.

353); such as fruit-trees and ornamental shrubbery in a nursery (Smith v. Price, 39 Ill. 28); rails or materials prepared for a fence (McLaughlin v. Johnson, 46 Ill. 163; Goodrich v. Jones, 2 Hill. (N. Y.) 142; Ripley v. Paige, 12 Vt. 353); lumber hauled for a building (McLaughlin v. Johnson, 46 Ill. 163); a hotel sign attached to a building or a post (Redlon v. Barker, 4 Kan. 445); dye-house (Noble v. Bosworth, 36 Mass. (19 Pick.) 314); fences (Glidden v. Bennett, 43 N. H. 306); a sundial (Snedeker v. Warring, 12 N. Y. 170); a cider mill (Wadleigh v. Janvrin, 41 N. H. 503; s. c. 77 Am. Dec. 780); manure (Parsons v. Camp, 11 Conn. 525; Staples v. Emery, 7 Me. (7 Greenl.) 201; Lassell v. Reed, 6 Me. (6 Greenl.) 222; Daniels v. Pond, 38 Mass. (21 Pick.) 367; s. c. 32 Am. Dec. 369; Sawyer v. Twiss, 26 N. H. 345; Needham v. Allison, 24 N. H. (4 Fost.) 355; Conner v. Coffin, 22 N. H. 538; Kittredge v. Woods, 3 N. H. 503; Goodrich v. Jones, 2 Hill. (N. Y.) 142; Middlebrook v. Corwin, 15 Wend. (N. Y.) 169); the machinery in a mill (Farrar v. Stackpole, 6 Me. (6 Greenl.) 157; Winslow v. Merchants' Ins. Co., 45 Mass. (4 Metc.) 306; s. c. 38 Am. Dec. 368; Hill v. Sewald, 53 Pa. St. 271; Voorhis v. Freeman, 2 Watts & S. (Pa.) 116; s. c. 37 Am. Dec. 490); poles used in cultivating hops (Bishop v. Bishop, 11 N. Y. 123; s. c. 62 Am. Dec. 68); a cotton-gin (Bond v. Coke, 71 N. C. 97; Latham v. Blakely, 70 N. C. 368); but not cord wood (Brock v. Smith, 14 Ark. 431); or stones severed and removed to another part of the premises (Fulton v. Norton, 64 Me. 410). A contrary doctrine was held in *Pea v. Pea*, 35 Ind. 387, which case is of questionable authority; and in *Smith*

§ 132. "It seems pretty plain upon principle that an agreement to transfer the property in something that is attached to the soil at the time of the agreement, but which is to be severed from the soil and converted into goods before the property is to be transferred, is an agreement for the sale of goods within the meaning of the 9 Geo. IV. c. 14,¹ if not of the 29 Car. II. c. 3. The agreement is, that the thing shall be rendered into goods, and then in that state sold: it is an ex-

v. Odom, 63 Ga. 499, which depends upon the code of that state; and in *Strong v. Doyle*, 110 Mass. 92, in which case the oral agreement reserving the manure on a farm was made prior to the deed.

A sale of fixtures to be severed and removed is a sale of personal property not within the statute. *Scroggin v. Slater*, 22 Ala. 687; *Foster v. Mabe*, 4 Ala. 402; s. c. 37 Am. Dec. 749; *Landon v. Platt*, 34 Conn. 517. But see *Harkness v. Sears*, 26 Ala. 493; s. c. 62 Am. Dec. 742; *Merritt v. Judd*, 14 Cal. 59; *Capen v. Peckham*, 35 Conn. 88; s. c. 9 Am. L. Reg. (N. S.) 136; *Bostwick v. Leach*, 3 Day (Conn.) 476; *Smith v. Odom*, 63 Ga. 499; *Pea v. Pea*, 35 Ind. 387; *Dolliver v. Ela*, 128 Mass. 598; *Southbridge Saving Bank v. Exeter Machine Works*, 127 Mass. 542; *Strong v. Doyle*, 110 Mass. 92; *Weston v. Weston*, 102 Mass. 514; *Antoni v. Belknap*, 102 Mass. 193; *Gibbs v. Estey*, 81 Mass. (15 Gray) 587; *Wall v. Hines*, 70 Mass. (4 Gray) 256; s. c. 64 Am. Dec. 64; *Perkins v. Swank*, 43 Miss. 349; *Rogers v. Crow*, 40 Mo. 91; *Powell v. McAshan*, 28 Mo. 70; *Hays v. Doane*, 11 N. J. Eq. (3 Stockt.) 84; *Ombony v. Jones*, 19 N. Y. 234; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *Brown v. Morris*, 83 N. C. 251; *Heysham v. Dettre*, 89 Pa. St. 506; *Wilkins School Dist. v. Milligan*, 88 Pa. St. 96; *Jarechi v. Philharmonic Society*, 79 Pa. St. 403; s. c. 21 Am. Rep. 78; *Seeger v. Pettit*, 77 Pa. St. 437; s. c. 18 Am. Rep. 452; *Spencer*

v. Darlington, 74 Pa. St. 286; *Ross' Appeal*, 9 Pa. St. 491; *Providence Gas. Co. v. Thurber*, 2 R. I. 15; s. c. 55 Am. Dec. 621; *Montague v. Dent*, 10 Rich. (S. C.) 135; s. c. 67 Am. Dec. 572; *Peck v. Batchelder*, 40 Vt. 235; *Wing v. Gray*, 38 Vt. 261; *Smith v. Waggoner*, 50 Wis. 155; *Van Ness v. Pacard*, 27 U. S. (2 Pet.) 137; bk. 7, L. ed. 374; *Elwes v. Mawe*, 3 East, 38; 2 Smith's Lead. Cas. 228. However, compare *Rogers v. Cox*, 96 Ind. 157; *Central Branch R. R. Co. v. Fritz*, 20 Kans. 430; s. c. 27 Am. Rep. 175; *Morris v. French*, 106 Mass. 326; *Howard v. Fessenden*, 96 Mass. (14 Allen) 124; *Shaw v. Carbrej*, 95 Mass. (13 Allen) 462; *Dame v. Dame*, 28 N. H. 429; s. c. 75 Am. Dec. 195; *Conner v. Coffin*, 22 N. H. 358; *Bond v. Coke*, 71 N. C. 97; *Latham v. Blakely*, 70 N. C. 368; *Long v. White*, 42 Ohio St. 59; *Rogers v. Gilinger*, 30 Pa. St. 185; s. c. 72 Am. Dec. 694. A present sale of fixtures not severed has been held to be a sale of an interest in the land. *Noble v. Bosworth*, 36 Mass. (19 Pick.) 314 (distinguished in *Strong v. Doyle*, 110 Mass. 92, on the ground of no severance). See, also, *Landon v. Platt*, 34 Conn. 517; *Trull v. Fuller*, 28 Me. 545; *Lyle v. Palmer*, 42 Mich. 314; *Detroit H. & D. R. R. Co. v. Forbes*, 30 Mich. 165; *Patton v. Moore*, 16 W. Va. 428; s. c. 37 Am. Rep. 789; *Walton v. Jarvis*, 13 Up. Can. Q. B. 616; s. c. 14 Up. Can. Q. B. 640.

¹ Tenterden's Act, ante, p. 89.

ecutory agreement for the sale of goods not existing in that capacity at the time of the contract. And when the agreement is, that the property is to be transferred before the thing is severed, it seems clear enough that it is *not* a contract for the sale of goods; it is a contract for a sale, but the thing to be sold is not goods. If this be the principle, the true subject of inquiry in each case is, when do the parties intend that the property is to pass? If the things perish by inevitable accident before the severance, whom do they mean to bear the loss? for in general that is a good test of whether they intend the property to pass or not; in other words, if the contract be for the sale of the things after they have been severed from the land, so as to become the subject of larceny at common law, it is, at least since the 9 Geo. IV. c. 14, a contract for the sale of goods, wares and merchandise, within the seventeenth section. On the whole the cases are very much in conformity with these distinctions, though there is some authority for saying that a sale of emblements or fixtures, vesting an interest in them whilst in that capacity and before severance, is a sale of goods within the meaning of the seventeenth section of the Statute of Frauds, and a good deal of authority that such a sale is not a sale of an interest in land within the fourth section, which may, however, be the case, though it is not * a sale of goods, [*109] wares, and merchandise, within the seventeenth."²

Nothing is to be found in the cases reported since this perspicuous exposition was published, to affect its accuracy, or to shake the deductions drawn by the learned author from the authorities now extant. There can be little hazard, therefore, in laying down the rules that govern this subject, supporting them by the appropriate decisions, and calling attention to such cases as seem to conflict with the general current of authority.

§ 133. *The first principle then is*, that an agreement to transfer the property in anything attached to the soil at the

² Blackburn on Sales, 9, 10. As sale of fixtures is the sale of a right to a sale of fixtures, see *Lee v. Gaskell*, 1 Q. B. D. 700; *post*, p. 118. "The principle seems to be that a sale of fixtures is the sale of a right to sever during the tenancy," *per Cockburn C. J.* at p. 701.

time of the agreement, *but which is to be severed from the soil, and converted into goods, BEFORE the property is transferred to the purchaser*, is an agreement for the sale of goods, an executory agreement, governed by Lord Tenterden's Act, and therefore within the 17th section.¹

In *Smith v. Surman*² the agreement was to sell standing timber, which the proprietor had begun to cut down, two trees having already been felled, at so much a foot. Held to be within the 17th section. Bayley J. in referring to this case, in *Earl of Falmouth v. Thomas*,³ lays stress on the fact, "that the *seller* was to cut down; the timber was to be made a chattel by the *seller*"⁴ [but this distinction has since been held to be immaterial, *Marshall v. Green*, 1 C. P. D. 35, *post*, p. 116].

In *Parker v. Staniland*⁵ the sale was by the plaintiff of all the potatoes on a close of two acres, at 4s. 6d. a sack, and the defendant was to get them immediately. Here, also, it was held that there was a sale of chattels, and no transfer of any interest in the land; but both Lord Ellenborough and Mr. Justice Bayley put the case on the ground that the potatoes were to be taken away *immediately*, and to gain nothing by further growth in the soil;⁶ and they made [*110] *this fact the ground for distinguishing the case from *Crosby v. Wadsworth*,⁷ and *Waddington v. Bristow*,⁸ where sales of growing crops of grass had been held to come under the 4th section.

¹ See *vide infra*, § 142. See, also, *Marshall v. Green*, L. R. 1 C. P. Div. 40.

Executory sale of fructus naturales.—The doctrine of the text on this subject has been adopted in some states and repudiated in others. See, *Miller v. State*, 39 Ind. 267; *Cutler v. Pope*, 13 Me. 377; *Erskine v. Plummer*, 7 Me. (7 Greenl.) 447; *Poor v. Oakman*, 104 Mass. 309; *White v. Foster*, 102 Mass. 375; *Drake v. Wells*, 93 Mass. (11 Allen) 141; *Giles v. Simonds*, 81 Mass. (15 Gray) 441; *Stearns v. Washburn*, 73 Mass. (7 Gray) 187; *Nettleton v. Sikes*, 49 Mass. (8 Metc.) 34; *Claffin*

v. Carpenter, 45 Mass. (4 Metc.) 580; s. c. 38 Am. Dec. 381. *Vide infra*, § 136, notes 1 and 2.

² *Smith v. Surman*, 9 Barn. & Cres. 561, is commented by Lord Coleridge in *Marshall v. Green*, L. R. 1 C. P. Div. 40.

³ 1 C. & M. 105.

⁴ *Vide infra*, § 142, note 3. *Byasse v. Reese*, 4 Met. (Ky.) 372; *Huff v. McCauley*, 53 Pa. St. 206; *Marshall v. Green*, L. R. 1 C. P. Div. 35.

⁵ 11 East, 362.

⁶ *Marshall v. Green*, L. R. 1 C. P. Div. 35.

⁷ 6 East, 602.

⁸ 2 B. & P. 452.

In *Warwick v. Bruce*,⁹ decided by the King's Bench in 1813, which was followed by *Sainsbury v. Matthews*,¹⁰ in the Exchequer, in 1838, the sale was of potatoes *not mature*, and that were to be dug by the *purchasers* when ripe, in the former case for a gross sum, and in the latter at 2s. per sack; and in both cases the distinctions suggested in *Smith v. Surman*, and *Parker v. Staniland*, were disregarded; and the sale in *Warwick v. Bruce* was held not to be of an interest in land under the 4th section, while the decision in the Exchequer case went the full length of deciding that the sale was one of goods and chattels, governed by the 17th section. The distinction between crops of mature and immature *fructus industriales* was also expressly repudiated by Littledale J. in *Evans v. Roberts*.¹¹

§ 134. In *Washburn v. Burrows*,¹ where the pleadings averred that certain crops of grass, growing on a particular estate, were assigned as security, it became necessary to inquire whether this averment necessarily implied the transfer of an interest in land. The Court, after taking time to consider, intimated that this plea would be satisfied by proving that the grass was to be severed from the soil, and delivered as a chattel. Rolfe B. in delivering the judgment, said, "Certainly, where the owner of the soil sells what is growing on the land, whether natural produce, as timber, grass, or apples, or *fructus industriales*, as corn, pulse, or the like, on the terms that he is to cut or sever them from the land, and then deliver them to the purchaser, the purchaser acquires no interest in the soil, which in such case is only in the nature of a warehouse for what is to come to him merely as a personal chattel."²

§ 135. *In most of the foregoing cases it will be [*111] observed, that under the contracts the property in the thing sold remained in the vendor till after severance. In *Smith v. Surman*, the price depended on the meas-

⁹ 2 M. & S. 205.

¹⁰ 4 M. & W. 434.

¹¹ 5 B. & C. 836.

¹ 1 Ex. 107.

² See *per* Grove J. in *Marshall v. Green*, L. R. 1 C. P. Div. 44. *Vide infra*, § 140, note 2. See, also, Grove J. in *Marshall v. Green*, L. R. 1 C. P. Div. 44.

urement of the timber after cutting it, for it was sold at so much a foot: and in *Parker v. Staniland*, and *Sainsbury v. Matthews*, the potatoes were also to be measured after being gathered, in order to determine the price. If the thing sold had been destroyed before measurement, the loss would have fallen on the vendor, because the property remained in him. *Post*, Book II. Chap. 3. The bargain therefore was simply that the things sold were to be severed and converted into chattels before the sale took effect, and fell under the first principle above stated.¹ But *Warwick v. Bruce* is governed by the rule next to be stated.

§ 136. The second principle on this subject is, that where there is a perfect bargain and sale, vesting the property at once in the buyer before severance, a distinction is made between the natural growth of the soil, as grass, timber, fruit on trees, &c. &c. which at common law are part of the soil, and *fructus industriales*, fruits produced by the annual labor of man, in sowing and reaping, planting and gathering. The former are an interest in land, embraced in the 4th section;¹

¹ *Vide infra*, § 142, note 3.

¹ *Fructus naturales*.—Where contracted to be sold and carried away immediately or within a reasonable time, and not left to grow or attain additional strength and increase from the earth, the contract is for the sale of personal property; otherwise it is held a contract for the sale of an interest in land. *White v. Foster*, 102 Mass. 375; *Harrell v. Miller*, 35 Miss. 700; *Howe v. Batchelder*, 49 N. H. 204; *Kingsley v. Holbrook*, 45 N. H. 313; *Olmstead v. Niles*, 7 N. H. 522; *Slocum v. Seymour*, 38 N. J. L. (7 Vr.) 138; *Vorebeck v. Rowe*, 50 Barb. (N. Y.) 302; *Warren v. Leland*, 2 Barb. (N. Y.) 613; *Green v. Armstrong*, 1 Denio (N. Y.) 550; *Pattison's Appeal*, 61 Pa. St. 294; *Huff v. McCauley*, 53 Pa. St. 276; *Buck v. Pickwell*, 27 Vt. 157; *Lillie v. Dunbar*, 62 Wis. 198; *Daniels v. Bailey*, 43 Wis. 566; *Summers v. Cook*, 28 Grant (Ont.) 391; *Macdon-*

nel v. McKay, 15 Grant (Ont.) 391. This rule has been applied to the sale of nursery trees and shrubs (*Whitmarsh v. Walker*, 42 Mass. (1 Metc.) 313); to standing timber (*Byassee v. Reese*, 4 Met. (Ky.) 372; *Cutler v. Pope*, 13 Me. 377; *Erskine v. Plummer*, 7 Me. (7 Greenl.) 447; *Purner v. Piercy*, 40 Md. 212; *Nettleton v. Sikes*, 49 Mass. (8 Metc.) 84; *Claffin v. Carpenter*, 45 Mass. (4 Metc.) 580; s. c. 38 Am. Dec. 381; *Killmore v. Howlett*, 48 N. Y. 569; *Boyce v. Washburn*, 4 Hun (N. Y.) 792; *Smith v. Bryan*, 71 Pa. St. 365; *Sterling v. Baldwin*, 42 Vt. 306); to grass ready to be cut (*Banton v. Shorey*, 77 Me. 48); and to an apple and peach crop. *Cain v. McGuire*, 13 B. Mon. (Ky.) 340; *Brown v. Stancilift*, 80 N. Y. 627; s. c. 20 Alb. L. J. 55. See, also, *Purner v. Piercy*, 40 Md. 212. On such sale the property passes at once, together with a license to enter and gather and carry away; but this

the latter are chattels,² for at common law a growing crop, produced by the labor and expense of the occupier of lands, was, as the representative of that labor and expense, considered an independent chattel.³

license, while not revocable as to trees already cut (*Cool v. Peters Box Co.*, 87 Ind. 524; *Douglass v. Shumway*, 79 Mass. (13 Gray) 498; *Nelson v. Nelson*, 72 Mass. (6 Gray) 385; *Pierrepoint v. Barnard*, 6 N. Y. 279; *Green v. North Carolina R. R. Co.*, 73 N. C. 524) may be revoked as to timber still standing. *Armstrong v. Lawson*, 73 Ind. 498; *Owens v. Lewis*, 46 Ind. 488; *Drake v. Wells*, 93 Mass. (11 Allen) 141; *Giles v. Simons*, 81 Mass. (15 Gray) 441; *Putney v. Day*, 6 N. H. 430; *New Brunswick & N. S. L. Co. v. Kirk*, 1 Allen (N. B.) 443; *Mowray v. Gilbert*, 1 Hannay (N. B.) 545; *Kerr v. Connell*, 1 Birton (N. B.) 133. See, also, *Pattison's Appeal*, 61 Pa. St. 294; *Huff v. McCauley*, 53 Pa. St. 206; *Yeakle v. Jacob*, 33 Pa. St. 376.

² *Fructus industriales*. — All emblements, that is, all natural or artificial crops of grains or vegetables, the annual product of the labor and cultivation of the soil, are personal property and subject to be sold as such before maturity, no matter how long they are to remain in the soil in order to complete their growth. *Davis v. McFarlane*, 37 Cal. 634; *Marshall v. Ferguson*, 23 Cal. 65; *Bostwick v. Leach*, 3 Day (Conn.) 476; *Ticknor v. McClelland*, 84 Ill. 471; *Thompson v. Wilhight*, 81 Ill. 356; *Graff v. Fitch*, 58 Ill. 373, 377; s. c. 11 Am. Rep. 85; *Bull v. Griswold*, 19 Ill. 631; *Miller v. State*, 39 Ind. 267; *Sherry v. Picken*, 10 Ind. 375; *Bowman v. Conn*, 8 Ind. 58; *Bricker v. Hughes*, 4 Ind. 146; *Northern v. State*, 1 Ind. 113; *Moreland v. Myall*, 14 Bush, (Ky.) 474; *Craddock v. Riddlesbarger*, 2 Dana (Ky.) 206; *Robbins v. Oldham*, 1 Duv. (Ky.) 28; *Bryant v. Crosby*, 40 Me. 9, 23; *Cutler v. Pope*,

13 Me. 377; *Safford v. Annis*, 7 Me. 168; *Purner v. Piercy*, 40 Md. 212; *Smith v. Bryan*, 5 Md. 141; s. c. 59 Am. Dec. 104; *Delaney v. Root*, 99 Mass. 546; *Ross v. Welch*, 77 Mass. (11 Gray) 235; *Brown v. Sanborn*, 21 Minn. 402; *Howe v. Batchelder*, 49 N. H. 204; *Pitkin v. Noyes*, 48 N. H. 294; s. c. 2 Am. Rep. 218; *Kingsley v. Holbrook*, 45 N. H. 313; *Westbrook v. Eager*, 16 N. J. L. (1 Harr.) 81; *Bloom v. Welsh*, 27 N. J. L. (3 Dutch.) 177; *Lacustrine Fertilizer Co. v. Lake Guano & Fertilizer Co.*, 82 N. Y. 476, 484; *Harris v. Frink*, 49 N. Y. 24; s. c. 10 Am. Rep. 318; *Austin v. Sawyer*, 9 Cow. (N. Y.) 39; *Green v. Armstrong*, 1 Den. (N. Y.) 550, 554; *Reeder v. Sayre*, 6 Hun (N. Y.) 562; *Hartwell v. Bissell*, 17 Johns. (N. Y.) 128; *Stewart v. Doughty*, 9 Johns. (N. Y.) 108; *Frear v. Hardenbergh*, 5 Johns. (N. Y.) 272; s. c. 4 Am. Dec. 356; *Newcomb v. Ramer*, 2 Johns. (N. Y.) 421, note a; *Whipple v. Foot*, 2 Johns. (N. Y.) 418; s. c. 3 Am. Dec. 442; *Brittain v. McKay*, 1 Ired. (N. C.) L. 265; *Hershey v. Metzgar*, 90 Pa. St. 217; *Backenstoss v. Stahler's Adm'rs*, 33 Pa. St. 251, 254; s. c. 75 Am. Dec. 592; *Bear v. Bitzer*, 16 Pa. St. 178; s. c. 55 Am. Dec. 490; *Wilkins v. Vashbinder*, 7 Watts (Pa.) 379; *Bel lows v. Wells*, 36 Vt. 599; *Jones v. Flint*, 10 Ad. & El. 753; *Evans v. Roberts*, 5 Barn. & Cres. 829; *Peacock v. Purvis*, 2 Brod. & B. 362; *Sainsbury v. Matthews*, 4 Mees. & W. 343; *Dunn v. Ferguson*, 1 Hayes (Ir. Rep.) 540; 2 Bl. Com. 404; *Brown on Statute of Frauds*, secs. 250, 258; 2 Greenleaf's Ev. sec. 271.

³ *Per Bayley J. in Evans v. Roberts*, 5 B. & C. 836.

§ 137. The first and leading case in which this distinction was fully considered was *Evans v. Roberts*.¹ A verbal contract was made, by which the defendant agreed to purchase of the plaintiff a cover of potatoes then in the ground, to be turned up by the plaintiff, at the price of 5*l.*, and the defendant paid one shilling earnest. The action was assumpsit "for crops of potatoes bargained and sold," and it was objected that this was a contract of sale of an interest in or concerning land, within the meaning of the 4th section of the Statute of Frauds.

[*112] *Bayley J. said, "I am of opinion that in this case there was not a contract for the sale of any lands, tenements or hereditaments, or any interest in or concerning them, but a contract only for the sale or delivery of things, which, at the time of the delivery should be goods and chattels. It appears that the contract was for a cover of potatoes; *the vendor was to raise the potatoes from the ground*, at the request of the vendee. The effect of the contract, therefore, was to give to the buyer a right to all the potatoes which a given quantity of land should produce, but not to give him any right to the possession of the land; he was merely to have the potatoes delivered to him when their growth was complete. Most of the authorities cited in the course of the argument to show that this contract gave the vendee an interest in the land, within the meaning of the fourth section of the Statute of Frauds, are distinguishable from the present case. In *Crosby v. Wadsworth*,² the buyer did acquire an interest in the land, for by the terms of the contract, *he was to mow the grass*, and must therefore have had possession of the land for that purpose. Besides, in that case the contract was for the growing grass, which is the natural and permanent produce of the land, renewed from time to time without cultivation. Now, growing grass does not come within the description of goods and chattels, and can-

¹ See *Pitkin v. Noyes*, 48 N. H. 294; s. c. 2 Am. Rep. 218. See, also, authorities in last note, and *Prescott v. Locke*, 51 N. H. 97; s. c. 12 Am. Rep. 55; *Brown v. Stanclift*, Buffalo Super. Ct. 20 Alb. L. J. 55; affirmed

without opinion, 80 N. Y. 627; *Killmore v. Howlett*, 48 N. Y. 569; *Haydon v. Crawford*, 3 Up. Can. Q. B. (O. S.) 583; *Dunn v. Ferguson*, Hayes (Ir. Rep.) 542.

² 6 East, 602.

not be seized as such under a *fi. fa.*; it goes to the heir, and not to the executor; but growing potatoes come within the description of emblements, and are deemed chattels by reason of their being raised by labor and manurance. They go to the executor of tenant in fee simple, although they are fixed to the freehold,³ and may be taken in execution under a *fi. fa.* by which the sheriff is commanded to levy the debt of the *goods and chattels* of the defendant: and if a growing crop of potatoes be chattels, then they are not within the provisions of the fourth section of the Statute of Frauds, which relate to lands, tenements, or hereditaments, or any interest in or concerning them." And again, at p. 835, "It has been insisted that the right *to have [*113] the potatoes remain in the ground is an interest in the land, but a party entitled to emblements has the same right, and yet he is not by virtue of that right considered to have any interest in the land. For the land goes to the heir, but the emblements go to the executor. In Tidd's Practice, 1039, it is laid down, that under a *fieri facias* the sheriff may sell *fructus industriales*, as corn growing, which goes to the executor, or fixtures, which may be removed by the tenant; but not furnaces, or apples upon trees, which belong to the freehold, and go to the heir. The distinction is between those things which go to the executor, and those which go to the heir. The former may be seized and sold under the *fi. fa.*, the latter cannot. *The former must therefore, in contemplation of law, be considered chattels.*"

At the close of his opinion, the learned judge said: "I am of opinion that there was not in this case any contract or sale of lands, &c. *but that there was a contract for the sale of goods, wares, and merchandise, within the meaning of the 17th section*, though not to the amount which makes a written note or memorandum of the bargain necessary."

Holroyd J. said: "The contract being for the sale of the *produce* of a given quantity of land, was a contract to render what afterwards would become a chattel."

Littledale J. was as explicit as Bayley J. in taking the

³ Com. Dig. tit. *Biens* (G.).

distinction above pointed out. He said, at page 840: "This contract only gives to the vendee an interest in that growing produce of the land which constituted its annual profit. Such an interest does not constitute part of the realty. * * Lord Coke in all cases distinguishes between the land and the growing produce of the land: he considers the latter as a personal chattel independent on, and distinct from, the land. If, therefore, a growing crop of corn does not in any of these cases constitute any part of the land, I think that a sale of any growing produce of the earth (reared by labor and expense), in actual existence at the time of contract, whether it be in a state of maturity or not, is not to be considered as a sale of an interest in or concerning land within the meaning of the 4th section of the Statute of Frauds; [*114] *but a contract for the sale of goods, wares, and merchandise, within the 17th section of that statute."

§ 138. In *Jones v. Flint*,¹ decided in 1839, *Evans v. Roberts* was followed and approved, on the ground of the distinction between *fructus industriales*, which are chattels, and the natural growth of grass, &c. which are part of the freehold; and any distinction between crops mature and immature, as well as between cases where the buyer or the seller is to take the crop out of the ground, was expressly rejected. In both cases also the earlier *dictum*² of Sir James Mansfield in *Emmerson v. Heelis*³ is practically overruled.

The two cases of *Evans v. Roberts* and *Jones v. Flint* have remained unquestioned to the present time as authority for the rule that *fructus industriales*, even when growing in the soil, are chattels; while another series of decisions has maintained the principle that the natural growth of the land is part of the freehold, and that contracts for the sale of it, transferring the property before severance, are governed by the 4th section.

§ 139. In *Rodwell v. Phillips*,¹ a written sale of "all the crops of fruit and vegetables of the upper portion of the

¹ 10 A. & E. 753.

² 2 Taunt. 38.

³ But see Blackburn on Sale, p. 19, note, where the author shows that it is not merely a *dictum*, but a decision.

¹ 9 Mees. & W. 502. See, also, *Brown v. Stancliff*, 80 N. Y. 627; s. c. 20 Alb. L. J. 55.

garden, from the large pear trees for the sum of 30*l.*," the purchaser having paid down 1*l.* as deposit, was held by Lord Abinger to be the sale of an interest in land; but the *ratio decidendi* was that it certainly was not such a contract for the sale of goods, wares, and merchandise as under the Stamp Act was exempted, and the plaintiff was non-suited, the agreement not being stamped.

§ 140. In *Carrington v. Roots*,¹ plaintiff, in May, made a verbal agreement to buy a crop of grass growing on a certain close, to be cleared by the end of September, at £5:10*s.* per acre: half the price to be paid down before any of the grass was cut. Held by all the judges, to be void under the 4th section.² This case is in entire conformity with *Crosby v. *Wadsworth*,³ where Lord Ellenborough [*115] held a similar contract to be an agreement for the sale of an interest in land, "conferring an exclusive right to the vesture of the land during a limited time and for given purposes."

In *Scovell v. Boxall*,⁴ a parol contract for the purchase of standing underwood, to be cut down by the purchaser, and in *Teal v. Auty*,⁵ an unstamped agreement for the sale of growing poles, were held to be agreements for the sale of an interest in land.⁶ In the former case, *Hullock B.* cited with approval, and recognized as authority, the case of *Evans v. Roberts*.⁷

§ 141. In all these cases it will be remarked that the distinction pointed out by Lord Blackburn in his treatise, is found to prevail. In *Rodwell v. Phillips*, the whole crop of fruit on the trees; in *Carrington v. Roots*, and *Crosby v.*

¹ 2 Mees. & W. 248.

² See *Lamson v. Patch*, 87 Mass. (5 Allen) 586. See, also, *Stearns v. Washburn*, 78 Mass. (7 Gray) 187; *Chaffin v. Carpenter*, 45 Mass. (4 Metc.) 582, 583; s. c. 38 Am. Dec. 575; *Whitmarsh v. Walker*, 42 Mass. (1 Metc.) 315; *Miller v. Baker*, 42 Mass. (1 Metc.) 27, 33; *Lewis v. Culbertson*, 11 Serg. & R. (Pa.) 48; s. c. 14 Am. Dec. 607; *Empson v. Soden*,

4 Barn. & Ad. 655; *Waddington v. Bristow*, 2 Bos. & Pul. 455; *Evans v. Roberts*, 5 Barn. & Cress. 832; *Crosby v. Wadsworth*, 6 East, 602.

³ 6 East, 602.

⁴ 1 Y. & Jerv. 396.

⁵ 2 Br. & B. 101.

⁶ To the same effect is the case of *Kingsley v. Holbrook*, 45 N. H. 313, 319.

⁷ 5 Barn. & C. 836.

Wadsworth, the whole growth of grass on the land; and in *Scovell v. Boxall*, and *Teal v. Auty*, the standing undergrowth, and the growing poles, were all transferred to the purchasers *before severance* from the soil.¹

§ 142. From all that precedes, the law on the subject of the sale of growing crops may be summed up in the following proposition viz.:—

Growing crops, if *fructus industriales*, are chattels, and an agreement for the sale of them, whether mature or immature, whether the property in them is transferred before or after severance, is not an agreement for the sale of any interest in land, and is not governed by the 4th section of the Statute of Frauds.¹ Growing crops, if *fructus naturales*, are part of the soil *before severance*, and an agreement, therefore, vesting an interest in them in the purchaser before severance, is governed by the 4th section;² but if the interest is not to be vested till they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods, wares, and merchandise, governed by the 17th, and not by the 4th section of the statute.

[*116] § 143. * [In the recent case of *Marshall v. Green*¹ the facts were very similar to those in *Smith v. Surman* (*ante*, p. 109), except that the timber was to be cut down by the PURCHASER and removed by him *as soon as possible*.² Held, that the agreement was not a contract *for an interest in*

¹ As to when the title is transferred under such contracts, see *White v. Foster*, 102 Mass. 378.

² See *Marshall v. Ferguson*, 28 Cal. 65; *Bull v. Griswold*, 19 Ill. 631; *Miller v. State*, 39 Ind. 267; *Sherry v. Picken*, 10 Ind. 375; *Bricker v. Hughes*, 4 Ind. 146; *Moreland v. Myall*, 14 Bush (Ky.) 474; *Bryant v. Crosby*, 40 Me. 9, 21, 23; *Cutler v. Pope*, 13 Me. 377; *Purner v. Piercy*, 40 Md. 212; *Ross v. Welch*, 77 Mass. (11 Gray) 235; *Howe v. Batchelder*, 49 N. H. 204, 208; *Kingsley v. Holbrook*, 45 N. H. 313, 318, 319; *Brittain v. McKay*, 1 Ired. (N. C.) L. 265; *Austin v. Sawyer*, 9 Cow. (N. Y.) 39;

Stewart v. Doughty, 9 Johns. (N. Y.) 112; *Whipple v. Foot*, 2 Johns. (N. Y.) 422; *Buck v. Pickwell*, 27 Vt. 157; *Dunne v. Ferguson*, *Hayes Ir. Rep.* 541.

² See *Slocum v. Seymour*, 36 N. J. L. (7 Vr.) 138; *Marshall v. Green*, L. R. 1 C. P. Div. 38-40; *Ellis v. Grubb*, 3 Up. Can. Q. B. (O. S.) 611.

¹ 1 C. P. D. 35.

² It is to be observed, however, that in *Smith v. Surman* the contract was not one for the sale of growing timber, but for the sale of timber *at so much per foot*, i.e., after its conversion into chattels.

land within the 4th section, and that as there was no intention that the purchaser should derive any benefit from the continuance of the timber in the soil, it was immaterial whether the seller cut and delivered the timber to the purchaser, or the purchaser entered upon the land and cut it for himself.

In the judgment of Brett J. will be found an exposition of the tests applicable to this class of cases.³

The decision in *Marshall v. Green* seems open to some criticism. It must be supported either on the ground that it falls within the first principle (*ante*, p. 109), viz., that the property in the timber was not to pass until it had been cut down, and that this was the inference drawn from the words "to be cut down as soon as possible," or else it must be taken to have introduced a limitation upon the second principle (*ante*, p. 111), viz., that even when the property passes before severance in *fructus naturales*, yet if the evidence shows that they are to gain nothing by further growth in the soil, then to sell them as they stand is not a sale under the 4th, but under the 17th section.

Brett J. says (at p. 42), "Where the things are not *fructus industriales*, then the question seems to be whether it can be gathered from the contract that they are intended to remain in the land for the advantage of the purchaser, and are to derive benefit from so remaining: then part of the subject-matter of the contract is in the interest in land, and the case is within the section."

And Grove J. (at p. 244), "Here the trees were to be cut down as soon as possible, but even assuming that they were *not to be cut for a month, I think that [*117] the test would be whether the parties really looked to their deriving benefit from the land, or merely intended that the land should be in the nature of a 'warehouse' for the trees during that period."⁴

³ See *Duppa Ex'r v. Mayo*, 1 Saund. 276, and notes.

⁴ A contract giving a right to go on certain grounds, to hunt and carry away a definite portion of the game

killed is said, in *Webber v. Lee*, L. R. 9 Q. B. Div. 315, to be the grant of an interest in land and a profit à prendre; and is within the Statute of Frauds.

§ 144. Whether *fructus industriales* while still growing are not only chattels, but "goods, wares, and merchandise," has not, it is believed, been directly decided.¹ Both Bayley J.

¹ See *Glover v. Coles*, 1 Bing. 6; and *Owen v. Legh*, 3 B. & Ald. 470; both being cases of distress for rent. See, also, *Pitkin v. Noyes*, 48 N. H. 294. *Vide ante*, § 137, note 4.

A sale of growing trees, with a right at a future time, whether fixed or indefinite, to enter upon the land and remove, conveys an interest in the land. *Harrell v. Miller*, 35 Miss. 700; s. c. 72 Am. Dec. 154; *Howe v. Batchelder*, 49 N. H. 204; *Kingsley v. Holbrook*, 45 N. H. 313; *Ockington v. Richey*, 41 N. H. 275; *Olmstead v. Niles*, 7 N. H. 522; *Putney v. Day*, 6 N. H. 430; s. c. 25 Am. Dec. 470; *Hendrickson v. Ivins*, 1 N. J. Eq. (1 Saxe.) 562; *Slocum v. Seymour*, 36 N. J. L. (7 Vr.) 138; s. c. 13 Am. Rep. 432; *McGregor v. Brown*, 10 N. Y. 114; *Vorebeck v. Roe*, 50 Barb. (N. Y.) 302; *Dubois v. Kelly*, 10 Barb. (N. Y.) 496; *Pierrepoint v. Barnard*, 5 Barb. (N. Y.) 364; *Warren v. Leland*, 2 Barb. (N. Y.) 614; *Green v. Armstrong*, 1 Den. (N. Y.) 560; *Boyce v. Washburn*, 4 Hun (N. Y.) 792; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380; s. c. 30 Am. Dec. 60; *Bowers v. Bowers*, 95 Pa. St. 477; *Pattison's Appeal*, 61 Pa. St. 294; *Huff v. McCauley*, 53 Pa. St. 206; *Yeakle v. Jacob*, 33 Pa. St. 376; *Buck v. Pickwell*, 27 Vt. 157; *Hutchins v. King*, 68 U. S. (1 Wall.) 53; bk. 17, L. ed. 544. Because standing trees are a part and parcel of the land in which they are rooted and as such are real property. *Green v. Armstrong*, 1 Den. (N. Y.) 560; *Hutchins v. King*, 68 U. S. (1 Wall.) 53; bk. 17, L. ed. 544.

Sale of growing timber.—Where the intention is to transfer the title to the trees, after they shall have been felled or separated from the realty, is held to be an executory contract for the sale of personal property. *Bostwick*

v. Leach, 3 Day (Conn.) 476, 484; *Armstrong v. Lawson*, 73 Ind. 498; *Owens v. Lewis*, 46 Ind. 488; s. c. 15 Am. Rep. 295; *Byassee v. Reese*, 4 Met. (Ky.) 372; *Cain v. McGuire*, 13 B. Mon. (Ky.) 340; *Edwards v. Grand Trunk R. R.* 54 Me. 105; *Cutler v. Pope*, 13 Me. 377; *Erskine v. Plummer*, 7 Me. (7 Greenl.) 447; s. c. 22 Am. Dec. 216; *Purner v. Piercy*, 40 Md. 212; *Smith v. Bryan*, 5 Md. 141; s. c. 59 Am. Dec. 104; *White v. Foster*, 102 Mass. 375; *Delaney v. Root*, 99 Mass. 546; *Drake v. Wells*, 93 Mass. (11 Allen) 141; *Parsons v. Smith*, 87 Mass. (5 Allen) 578; *Giles v. Simonds*, 81 Mass. (15 Gray) 441; s. c. 77 Am. Dec. 373; *Douglas v. Shumway*, 79 Mass. (13 Gray) 498; *Nettleton v. Sikes*, 49 Mass. (8 Metc.) 34; *Claffin v. Carpenter*, 45 Mass. (4 Metc.) 580; s. c. 38 Am. Dec. 381; *Whitmarsh v. Walker*, 42 Mass. (1 Metc.) 313; *Harrell v. Miller*, 35 Miss. 700; s. c. 72 Am. Dec. 154; *Killmore v. Howlett*, 48 N. Y. 569; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380; s. c. 30 Am. Dec. 60; *McClintock's Appeal*, 71 Pa. St. 365; *Sterling v. Baldwin*, 42 Vt. 306; *Ellison v. Brigham*, 38 Vt. 64; *Marshall v. Green*, L. R. 1 C. P. Div. 35. On such a sale the title is vested in the vendee absolutely. *Owens v. Lewis*, 46 Ind. 488; s. c. 15 Am. Rep. 295; *Russell v. Richards*, 11 Me. (2 Fairf.) 371; s. c. 26 Am. Dec. 532; 10 Me. (1 Fairf.) 429; 25 Am. Dec. 254; *Drake v. Wells*, 93 Mass. (11 Allen) 141, 143; *Giles v. Simonds*, 81 Mass. (15 Gray) 441; s. c. 77 Am. Dec. 373; *McNeal v. Emerson*, 81 Mass. (15 Gray) 384; *Heath v. Randall*, 58 Mass. (4 Cush.) 195; *Nettleton v. Sikes*, 49 Mass. (8 Metc.) 34; *Pierrepoint v. Barnard*, 5 Barb. (N. Y.) 364; s. c. 6 N. Y. 279; 2 Am. Lead. Cas. (4th Am. ed.) 739, 740, 746, 762;

and Littledale J. expressed an opinion in the affirmative in *Evans v. Roberts* (*supra*, pp. 111-114), and Mr. Taylor, in his *Treatise on Evidence*,² treats the proposition as being per-

Smith v. Benson, 1 Hill (N. Y.) 176; *Mumford v. Whitney*, 15 Wend. (N. Y.) 380; s. c. 30 Am. Dec. 60; *Barnes v. Barnes*, 6 Vt. 388. And that where chattels belonging to one person are placed or left on the land of another, the owner has an implied irrevocable license to enter and remove them. *Owens v. Lewis*, 46 Ind. 488; s. c. 15 Am. Rep. 295; *Russell v. Richards*, 11 Me. (2 Fairf.) 371; s. c. 28 Am. Dec. 532; 10 Me. (1 Fairf.) 429; 25 Am. Dec. 254; *Drake v. Wells*, 93 Mass. (11 Allen) 141, 143; *Giles v. Simonds*, 81 Mass. (15 Gray) 441; s. c. 77 Am. Dec. 373; *McNeal v. Emerson*, 81 Mass. (15 Gray) 384; *Heath v. Randall*, 58 Mass. (4 Cush.) 195; *Nettleton v. Sikes*, 49 Mass. (8 Metc.) 34; *Pierrepont v. Barnard*, 6 N. Y. 179; s. c. 5 Barb. (N. Y.) 364; 2 Am. Lead. Cas. (4th Am. ed.) 789, 740, 746, 752; *Smith v. Benson*, 1 Hill (N. Y.) 176; *Mumford v. Whitney*, 15 Wend. (N. Y.) 370; s. c. 30 Am. Dec. 60; *Barnes v. Barnes*, 6 Vt. 388.

English doctrine.—In *Marshall v. Green*, L. R. 1 C. P. Div. 35, Chief Justice Coleridge holds that a sale of growing timber to be taken away as soon as possible by the purchaser is not a contract for the sale of land or any interest therein, within the Statute of Frauds. See *Teal v. Outy*, 2 Brod. & Bing. 199; *Scovell v. Boxall*, 1 Young & J. 396. But see *Jones v. Flint*, 10 Ad. & El. 753; *Smith v. Surman*, 9 Barn. & Cres. 561; *Evans v. Roberts*, 5 Barn. & Cres. 829; *Crosby v. Wadsworth*, 6 East, 602; *Rodwell v. Phillips*, 9 Mees. & W. 501.

However, in those states where the present English doctrine does not prevail, while the trees continue in the natural condition, and before felled, no property or title passes to the ven-

dee, because the contract is still executory and may be revoked. *Owens v. Lewis*, 46 Ind. 488; s. c. 15 Am. Rep. 295; *Drake v. Wells*, 93 Mass. (11 Allen) 143; *Giles v. Simonds*, 81 Mass. (15 Gray) 444; s. c. 77 Am. Dec. 373; *Whitmarsh v. Walker*, 42 Mass. (1 Metc.) 316; *Kerr v. Connell*, *Burtin* (N. B.) 151; *McCarthy v. Oliver*, 14 Up. Can. C. P. 290.

Canadian doctrine.—An agreement in writing to sell all of a specified kind of timber on certain lands, part of the price to be paid at once, and the balance to be paid within a year, and the timber to be removed within eight years, was held to be a contract for the sale of an interest in land. *Summers v. Cook*, 28 Grant (Ont.) 179. See, also, *Lawrence v. Errington*, 21 Grant (Ont.) 261; *Macdonnell v. McKay*, 15 Grant (Ont.) 391; *Mitchell v. McGaffey*, 6 Grant (Ont.) 361, 362; *McCarthy v. Oliver*, 14 Up. Can. C. P. 290; *Chamberlain v. Smith*, 21 Up. Can. Q. B. 108; *Hamilton v. MacDonell*, 5 Up. Can. Q. B. (O. S.) 720; *Ellis v. Grubb*, 3 Up. Can. Q. B. 611.

In New Brunswick.—A parol contract conveys no interest in growing timber. *The New Brunswick Land Co. v. Kirk*, 1 Allen (N. B.) 443; *Kennedy v. Robinson*, 2 Cr. & Dix. 113; *Kerr v. Connell*, *Bert*. (N. B.) 133; *Murray v. Gilbert*, 1 Hannay (N. B.) 548; *Segee v. Perley*, 1 Kerr (N. B.) 439.

² *Tayl. Ev.* (ed. 1878) 875, s. 1043.

Growing crops if *fructus industriales* are chattels, and an agreement for their sale, whether mature or immature, is not an agreement for a sale in land. *Marshall v. Ferguson*, 23 Cal. 65, 69; *Bostwick v. Leach*, 3 Day (Conn.) 476; *Reed v. Johnson*, 14 Ill. 257; *Sherry v. Picken*, 10 Ind. 375; *Cradock v. Riddlesbarger*, 2 Dana (Ky.)

fectly clear in the same sense. Lord Blackburn, on the contrary,³ says that the proposition is "exceedingly questionable," and that no authority was given for it in *Evans v. Roberts*. Mr. Taylor cites no authority for his opinion. The cases bearing on this point are *Mayfield v. Wadsley*,⁴ and *Hallen v. Runder*.⁵ In the former, an outgoing tenant obtained a verdict, which was upheld, on a count for crops bargained and sold against an incoming tenant, who had agreed to take them at valuation; and in the latter, counts for fixtures bargained and sold were held sufficient, but Lord Blackburn observes on these cases, first, that in *Hallen v. Runder* the Court expressly decided that an agreement for the sale of fixtures, between the landlord and the outgoing tenant, was not a sale of *goods*, either within the Statute of Frauds, or the meaning of a count for goods sold and delivered; and, *secondly*, that in both cases the land itself was to pass to the purchaser, and the agreement was, therefore, rather an abandonment of the vendor's right to diminish the value of the land than a sale of anything. The learned author, in another passage,⁶ says that "they are certainly chattels, but they are not *goods*, but are so far a part of the soil, that larceny at common law could not be committed on them;" and Lord Ellen-
[*118] borough was also of *this opinion.⁷ This point must, it is apprehended, be considered as still undetermined.

[In *Lee v. Gaskell*,⁸ upon a tenant's bankruptcy his trustee sold the fixtures to the plaintiff, who re-sold them to the defendant the bankrupt's landlord. Held, following *Hallen v. Runder*, that the sale did not fall within either the 4th or the

204; *Parham v. Thompson*, 2 J. J. Marsh: (Ky.) 159; *Safford v. Annis*, 7 Me. (7 Greenl.) 168; *Purner v. Piercy*, 40 Md. 212; *Smith v. Bryan*, 5 Md. 141; s. c. 59 Am. Dec. 104; *Westbrook v. Eager*, 16 N. J. L. (1 Harr.) 81; *Green v. Armstrong*, 1 Den. (N. Y.) 550; *Backenstoss v. Stahlers, Admrs.* 33 Pa. St. 251; s. c. 75 Am. Dec. 592; *Bear v. Bitzer*, 16 Pa. St. 178; s. c. 55 Am. Dec. 490; *Wilkins v. Vashbinder*, 7 Watts (Pa.) 378; *Evans v. Roberts*, 5 Barn. & Cres. 829; *Sainsbury v. Matthews*,

4 Mees. & W. 343; *Eaton v. Southby*, Willes, 131; *Brown on Statute of Frauds*, secs. 250, 258; and authorities cited *ante* § 136, note 2.

³ Blackburn on Sale, pp. 19, 20.

⁴ 3 B. & C. 357. See *Knight v. New England Worsted Co.*, 26 Mass. (2 Cush.) 289.

⁵ 1 C. M. & R. 267. *Strong v. Doyle*, 110 Mass. 93.

⁶ Blackburn on Sale, p. 17.

⁷ See his decision in *Parker v. Staniland*, 11 East, 365.

⁸ 1 Q. B. D. 700.

17th section of the statute. "Fixtures," says Cockburn C. J. "although they may be removable during the tenancy, as long as they remain unsevered, are part of the freehold, and you cannot dispose of them to the landlord *or anyone else* as goods and chattels, because they are not severed from the freehold, so as to become goods and chattels."

§ 145. In *Lee v. Gaskell*, as in *Hallen v. Runder*, the fixtures were bought by the landlord, the only distinction between the cases being that in *Lee v. Gaskell* there had been an intermediate sale by the tenant's trustee. It remains, however, to be decided whether, on a purchase of fixtures by a person who is not the landlord, the sale does not fall within the 17th section, although, in the passage above cited, Cockburn C. J. takes the contrary view. And by an interlocutory remark (at p. 701), he indicates an opinion that the sale of fixtures is nothing more than the sale of the right to sever.¹]

§ 146. It is sometimes a matter of doubt whether growing crops are properly comprehended in the class of *fructus industriales* or *fructus naturales*. There is an intermediate class of products of the soil, not annual, as emblements, not permanent, as grass or trees, but affording either no crop till the second or third year, or affording a succession of crops for two or three years before they are exhausted, such as madder, clover, teasles, &c. The only reported case on this is *Graves v. Weld*,¹ which was argued by very able counsel, and decided, after consideration, by Lord Denman, who delivered the unanimous judgment of the Court, consisting of himself and Littledale, Parke and Patterson, JJ.

The facts * were that the plaintiff was possessed of a [*119] close under a lease for ninety-nine years, *determinable on three lives*. In the spring of 1830, the plaintiff sowed the land with barley, and in May he sowed broad clover seed with the barley. The last of the three lives expired on the

¹ In a case where the owner of land from which brick was being made reserved title till his clay was paid for, the court said: "The Statute of Frauds has no application to a contract concerning personalty, which

the brick became, and which but leaves title where it was, in the owner of the soil." *Brown v. Morris*, 83 N. C. 251, 254.

¹ 5 Barn & Ad. 105.

27th of July, 1830, the reversion being then in defendant. In January, 1831, plaintiff delivered up the close to the defendant, but in the meantime had taken off, in the autumn of 1830, the crop of barley, in mowing which a little of the clover plant, that had sprung up, was cut off, and taken together with the barley. According to the usual course of good husbandry, broad clover is sown about April or May, and is fit to be taken for hay about the beginning of June *of the following year*. The clover in question was cut by the defendant about the end of May, 1831, more than a twelve-month after the seed had been sown. The defendant also took, according to the common course of husbandry, a second crop of the clover in the autumn of the same year, 1831. The jury found, on questions submitted by the judge: 1st. — That the plaintiff did not receive a benefit from taking the clover with the barley straw sufficient to compensate him for the cost of the clover seed, and the extra expense of sowing and rolling. 2d. — That a prudent and experienced farmer knowing that his term was to expire at Michaelmas, would not sow clover with his barley in the spring, where there was no covenant that he should do so; and would not in the long run and on the average, repay himself in the autumn for the extra cost he had incurred in the spring.

The case was argued by Follet for plaintiff, and Gambier for defendant, and Lord Denman, in delivering the judgment of the whole Court, said: "In the very able argument before us, both sides agreed as to the principle upon which the law which gives emblements was originally established. That principle was that the tenant should be encouraged to cultivate by being sure of the fruits of his labor; but both sides were also agreed that the rule did not extend to give the tenant *all* the fruits of his labor, or the right might be extended in that case to things of a more permanent nature, as

trees, or to more crops than one; for the cultivator [*120] very often looks for a * compensation for his capital

and labor in the produce of successive years. It was therefore admitted by each that the tenant would be entitled to that species of product only which grows by the industry and manurance of man, and to one crop only of that product. But

the plaintiff insisted that the tenant was entitled to the crop of any vegetable of that nature, whether produced annually or not, which was growing at the time of the cesser of the tenant's interest; the defendant contended that he was entitled to a crop of that species only which ordinarily repays the labor by which it is produced within the year in which that labor is bestowed, though the crop may, in extraordinary seasons, be delayed beyond that period. *And the latter proposition we consider to be law."*

§ 147. Again, "The principal authorities upon which the law of emblements depends are Littleton, sec. 68, and Coke's Commentary on that passage. The former is as follows: 'If the lessee soweth the land, and the lessor, after it is sown and before the corne is ripe, put him out, yet the lessee shall have the corne and shall have free entry, egress and regress to cut and carrie away the corne, because he knew not at what time the lessor would enter upon him.' Lord Coke says (Co. Litt. 55 a), 'The reason of this is, for that the estate of the lessee is uncertainne, and therefore lest the ground should be unmanured, which should be hurtful to the commonwealth, he shall reap the crop which he sowed, in peace, albeit the lessor doth determine his will before it be ripe. And so it is if he set rootes or sow hempe or flax or any other *annuall* profit, if *after the same be planted* the lessor oust the lessee, or if the lessee dieth, yet he or his executors shall have that *yeare's crop*. But if he plant young fruit trees or young oaks, ashes, elms, &c. or sow the grounds with acornes, &c. there the lessor may put him out notwithstanding, because they will yield *no present annuall profit*.' These authorities are strongly in favor of the rule contended for by defendant's counsel; they confine the rights to things yielding present *annual* profit, and to that year's crop which is growing when the interest determines. The case of hops, which grow from *ancient roots, and which [*121] yet may be emblements, though at first sight an exception, really falls within this rule. In *Latham v. Attwood*,¹

¹ 1 Cro. Car. 515. Cited and followed in *Bowman v. Conn*, 8 Ind. 58; *Brown v. Sanborn*, 21 Minn. 402. *Vide supra*, § 136, note 2.

they were held to be *like* emblements, because they were 'such things as grow by the manurance and industry of the owner, by the making of hills and setting poles:' that labor and expense, without which they would not grow at all, seemed to have been deemed equivalent to the sowing and planting of other vegetables."

§ 148. According to the principles here established, it would *seem* that the crop of the first year in such cases would be *fructus industriales*, but that of subsequent years, like fruit on trees planted by tenants, would be *fructus naturales*, unless requiring cultivation, labor, and expense for each successive crop, as hops do, in which event they would be *fructus industriales* till exhausted.¹ But the law as to the application of the Statutes of Frauds to sales of growing crops of this character, especially of crops subsequent to the first gathered, cannot be considered as settled.

§ 149. A singular case of the sale of crop not yet sown was determined in *Watts v. Friend*.¹ The bargain was, that the plaintiff should furnish the defendant with turnip-seed to be sown by the latter on his own land, and that the defendant should then sell to the plaintiff the whole of the seed produced from the crop thus raised at a guinea a bushel. The contract was held to be within the 17th section of the Statute of Frauds. The amount of the seed produced turned out to be 240 bushels, and as the agreement was that the crop should be severed before the property was transferred, was clearly not a sale of an interest in land; but the reporter, in a note to the case, calls attention to a point not discussed in it, viz., that when the bargain was made, it was *uncertain* whether the value of the seed to be produced would reach 10*l.*, and that under the 4th section it has been held, that cases depending on contingencies which may or may not happen within the year, are not within that section, though the event does not in fact happen within the year.

¹ A sale of unripe fruit on the trees for a specified sum of money paid, such fruit to be gathered by the purchaser as it ripens, is within the statute. *Purner v. Piercy*, 40 Md. 212, 223; s. c. 17 Am. Rep. 591.
¹ 10 B. & C. 446. See *Pitkin v. Noyes*, 48 N. H. 294, 303.

§ 150. *In the *Earl of Falmouth v. Thomas*,¹ [*122] where a farm was leased, and the tenant agreed to take the growing crops and the labor and materials expended, according to a valuation, it was held that the whole was a contract for an interest in land under the 4th section, and that plaintiff could not maintain an *indebitatus* count for goods bargained and sold to recover the price of the crops according to the valuation. Littledale J. expressed the same opinion in *Mayfield v. Wadsley*,² saying that "where the land is agreed to be sold, the vendee takes from the vendor the growing crops, the latter are considered part of the land." This rule seems founded on sound principles, for in such cases the fact of his having acquired an interest in the land is part of the consideration which moves the purchaser to buy the crops; or as it is put in *Blackburn on Sale*,³ the purchaser pays for an abandonment by the lessor or vendor of the right to injure the freehold. He buys an interest "*concerning* land," and that is covered by the language of the 4th section.

§ 151. In the early case of *Waddington v. Bristow*,¹ in 1801, an agreement for the purchase of growing hops at 10*l.* per cwt., to be put in pockets and delivered by seller, was held to require a stamp, and not to come within the exemption of agreements for the sale of goods, wares, and merchandise. The case is quite irreconcilable with the principles settled in the more modern decisions, and in *Rodwell v. Phillips*,² Parke B. said of it: "Hops are *fructus industriales*. That case would now probably be decided differently." It may therefore be considered as overruled.³

¹ 1 *Crom. & M.* 89.

² 3 *B. & C.* 366.

³ Page 20.

¹² *Bos. & P.* 452.

²⁹ *M. & W.* 503.

³ But in *Purner v. Piercy*, 40 *Md.* 212, peaches were held *fructus industriales* because requiring annual cultivation.

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* CHAPTER III.

WHAT IS A CONTRACT FOR THE PRICE, OR OF THE
VALUE OF 10*l*.

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§ 152. In several cases, questions have been raised as to the construction of the words "for the price of 10*l*. and upwards," and "of the value of ten pounds and upwards," as used in the 17th section of the Statute of Frauds, and in Lord Tenterden's Act.¹

In *Baldey v. Parker*,² the plaintiffs were linendrapers, and the defendant came to their shop and bargained for several articles. A separate price was agreed for each, and no one article was of the value of 10*l*. Some were measured in his presence, some he marked with a pencil, others he assisted in cutting from a larger bulk. He then desired an account of the whole to be sent to his house, and went away. The account as sent amounted to 70*l*., and he demanded a discount of 20*l*. per cent. for ready money, which was refused. The goods were then sent to his house, and he refused to take them. Held, that this was one entire contract within the 17th section.³ All the judges, Abbott C. J., Bayley, Hol-

¹ *Price or value*.—The word "price" is synonymous with the word "value" as used in the Statute of Frauds. Some American statutes use one word, some the other, and others still adopt the word "amount." The amount required by the different statutes varies from any "value" in Florida and Iowa to \$300 in Utah. *Vide ante*, § 104, note 2.

² B. & C. 37. See *Price v. Lee*, 1 B. & C. 156.

³ *Purchase of several articles*.—It

seems to have been *questio vexata* where a parol contract for the sale of various kinds of goods whether the sale of each lot is a distinct contract or whether the whole is one contract and is within the Statute of Frauds where the aggregate price exceeds the limit prescribed by the Statute of Frauds. The better opinion appears to be, at least at law, where the distinct contract is created as to each lot or parcel, that it is not; but it would be otherwise when a written contract

royd, and Best JJ. gave separate opinions. Abbott C. J. said, "Looking at the whole transaction, I am of opinion that the parties must be considered to have made one entire contract

is afterwards entered into and signed for the purchase of the several lots at an aggregated price. *Jenness v. Wendell*, 51 N. H. 63, 68; s. c. 12 Am. Rep. 48; *Gault v. Brown*, 48 N. H. 183; *Gilman v. Hill*, 36 N. H. 311; *Allard v. Greasert*, 61 N. Y. 1; *Brown v. Hall*, 5 Lans. (N. Y.) 177; *Mills v. Hunt*, 17 Wend. (N. Y.) 333; s. c. 20 Wend. (N. Y.) 431; *Coffman v. Hampton*, 2 Watts. & S. (Pa.) 377; s. c. 37 Am. Dec. 511; *Seaton v. Booth*, 4 Ad. & E. 528; *Roots v. Dormer*, 4 Barn. & Ad. 77; *Baldey v. Parker*, 2 Barn. & Cress. 37, 41; s. c. 3 Dowl. & Ry. 222; *Dykes v. Blake*, 4 Bing. N. C. 463; *Johnson v. Johnson*, 3 Bos. & Pull. 169; *Poole v. Shergold*, 2 Bro. Ch. 118; *Hart v. Mills*, 15 Mees. & W. 85; *Scott v. Eastern Cos. Ry. Co.*, 12 Mees. & W. 33; *Elliott v. Thomas*, 3 Mees. & W. 170; *Bigg v. Whisking*, 14 C. B. 195; s. c. 25 Eng. L. & Eq. 267. It makes no difference whether the sale is private or made at public auction aside from the binding force of the memorandum in writing which an auctioneer might make. *Jenness v. Wendell*, 51 N. H. 63, 69; s. c. 12 Am. Rep. 48; *Mills v. Hunt*, 20 Wend. (N. Y.) 431; *Barclay v. Tracy*, 5 Watts. & S. (Pa.) 45; *Coffman v. Hampton*, 2 Watts. & S. (Pa.) 377; s. c. 37 Am. Dec. 511; *Baldey v. Parker*, 2 Barn. & Cress. 37, 41; s. c. 3 Dowl. & Ry. 222. On such a sale a delivery of a part of the goods sold renders the sale valid for the whole within the Statute of Frauds. *Davis v. Moore*, 13 Me. 424; *Davis v. Eastman*, 83 Mass. (1 Allen) 422; *Jenness v. Wendell*, 51 N. H. 63; s. c. 12 Am. Rep. 48; *Gault v. Brown*, 48 N. H. 183; *Gilman v. Hill*, 36 N. H. 311; *Shepard v. Pressey*, 32 N. H. 56; *Allard v. Greasert*, 61 N. Y. 1; *Mills v. Hunt*, 17 Wend. (N. Y.) 333;

s. c. 20 Wend. (N. Y.) 431; *Chaplin v. Rogers*, 1 East, 192.

But where the articles sold are of different characters, to be delivered at different times and paid for respectively on delivery, a part delivery will not take the contract out of the Statute of Frauds, because in the contemplation of the parties it was to be executed distributively. *Tipton v. Feitner*, 20 N. Y. 423; *Aldrich v. Pyatt*, 64 Barb. (N. Y.) 391, 395; *Keeler v. Vandervere*, 5 Lans. (N. Y.) 313; *Mills v. Hunt*, 20 Wend. (N. Y.) 434; *Barclay v. Tracey*, 5 Watts. & S. (Pa.) 45.

Illegal sale of some of the articles where several articles are sold at the same time for a separate price as to each, will not affect the transaction as to those of which the sale was legal. *Goodwin v. Clark*, 65 Me. 280; *Dunbar v. Johnson*, 108 Mass. 519; *Warren v. Chapman*, 105 Mass. 87; *Bligh v. James*, 88 Mass. (6 Allen) 570; *Holt v. O'Brien*, 81 Mass. (15 Gray) 311; *Rundlett v. Weeber*, 69 Mass. (3 Gray) 263; *Robinson v. Green*, 44 Mass. (3 Metc.) 159; *Hall v. Costello*, 48 N. H. 176; s. c. 2 Am. Rep. 207; *Coburn v. Odell*, 30 N. H. (10 Fost.) 540; *Carleton v. Woods*, 28 N. H. (8 Fost.) 290; *Walker v. Lovell*, 28 N. H. (8 Fost.) 138; s. c. 61 Am. Dec. 605.

Delivery to carrier.—It is well settled that where there is a valid contract of sale, a delivery to a carrier according to the terms of the contract vests the title to the property in the buyer. *Allard v. Greasert*, 61 N. Y. 1. See *Cross v. O'Donnell*, 44 N. Y. 661. But a delivery according to a contract to a general carrier not designated or selected by the buyer does not constitute such a delivery and acceptance as will answer the Statute of Frauds.

for the whole of the articles." Bayley J. said, "It is conceded that on the same day, and indeed at the same [*124] *meeting, the defendant contracted with the plaintiffs for the purchase of goods to a much greater amount than 10*l*. Had the entire value been set upon the whole goods together, there cannot be a doubt of its being a contract for a greater amount than 10*l*. within the 17th section; and I think that the circumstance of a separate price being fixed upon each article makes no such difference as will take the case out of the operation of that law." Holroyd J. said, "This was all one transaction, though composed of different parts. At first it appears to have been a contract for goods of less value than 10*l*., but in the course of the dealing it grew to a contract for a much larger amount. At last, therefore, it was one entire contract within the meaning and mischief of the Statute of Frauds, *it being the intention of that statute, that where the contract, either at the commencement or the conclusion, amounted to or exceeded the value of 10*l*., it should not bind, unless the requisites there mentioned were complied with. The danger of false testimony is quite as great where the bargain is ultimately of the value of 10*l*., as if it had been originally of that amount.*"

Best J. said, "Whatever this might have been at the beginning, it was clearly at the close one bargain for the whole of the articles. The account was all made out together, and the conversation about discount was with reference to the whole account."⁴

§ 153. But where at an auction, the same person buys several successive lots as they are offered, a distinct contract arises for each lot,¹ and the decision to this effect

Rodgers v. Phillips, 40 N. Y. 519;
Dolley v. Marks, Bert. (N. B.) 346.

⁴ Bradley v. Parker is followed in Allard v. Greaser, 61 N. Y. 1, and Brown v. Hall, 5 Lans. (N. Y.) 177; but see Aldrich v. Pyatt, 64 Barb. (N. Y.) 391; see, also, Gault v. Brown, 48 N. H. 183; Gilman v. Hill, 36 N. H. 311, 318; Mills v. Hunt, 20 Wend. (N. Y.) 434.

¹ Purchase at auction sale. — Where

a person at a sale by auction of distinct parcels of land, which are separately described in the advertisement of the sale and separately sold, purchases a certain number of the parcels signing a separate memorandum of the purchase of each, which states the price and binds him to the terms of the sale, the purchase of each parcel is a distinct contract. Wells v. Day, 124 Mass. 38; Robin-

in *Emmerson v. Heelis*² was not questioned in *Baldey v. Parker*.

§ 154. Although at the time of the bargain it may be uncertain whether the thing sold will be of the value of 10*l*. according to the terms of the contract, yet, if in the result it turn out that the value actually exceeds 10*l*., the statute applies.¹ This point was involved in the decision in *Watts v. Friend*,² * where the sale was of a future [*125]

son v. Green, 44 Mass. (8 Metc.) 159; *Van Eps v. Schenectady*, 12 Johns. (N. Y.) 436; *Stoddart v. Smith*, 5 Binn. (Pa.) 355; *Roots v. Dormer*, 4 Barn. & Ad. 77; *Emmerson v. Heelis*, 2 Taunt. 38; *James v. Shore*, 1 Stark, 426. However, there is some authority to the contrary. See *Jenness v. Wendall*, 51 N. H. 63; s. c. 12 Am. Rep. 48; *Mills v. Hunt*, 17 Wend. (N. Y.) 333; s. c. 20 Wend. (N. Y.) 431; *Tompkins v. Haas*, 2 Pa. St. 74; *Coffman v. Hampton*, 2 Watts & S. (Pa.) 377; s. c. 37 Am. Dec. 511; *Kerr v. Shrader*, 1 Week. N. C. (Pa. 1874) 33; *Countess of Plymouth v. Throgmorton*, 1 Salk. 65; indeed, it seems that the tendency of the American cases is to hold that at auction sales, if bids are made for distinct lots, that the entire transaction is substantially but one contract. *Jenness v. Wendell*, 51 N. H. 63; s. c. 12 Am. Rep. 48; *Messer v. Woodman*, 22 N. H. (2 Fost.) 172; and authorities last above cited. However, it is otherwise where separate articles are sold at auction at different purchases to the same party but on different terms. *Barclay v. Tracy*, 5 Watts & S. (Pa.) 45.

² 2 Taunt. 38. Also *per Le Blanc J.* in *Rugg v. Minett*, 11 East, 218; *Roots v. Lord Dormer*, 4 B. & Ad. 77, and *per the law Lords* in *Couston v. Chapman*, L. R. 2 H. L. Sc. 250. See, also, *Wells v. Day*, 124 Mass. 38.

¹ *Uncertain price*.—Where the amount paid for goods is uncertain owing to the uncertainty of the quan-

tity to be delivered, it is incumbent on the parties seeking to enforce the contract to show that it is not void under the Statute of Frauds. *Carpenter v. Galloway*, 73 Ind. 418; *Bowman v. Conn*, 8 Ind. 58; *Brown v. Sanborn*, 21 Minn. 402; *Buskirk v. Cleveland*, 41 Barb. (N. Y.) 610; *Watts v. Friend*, 10 Barn. & Cress. 446; *Brown on Statute of Frauds*, 312. Thus a parol contract to sell at \$60.00 per ton all the broom corn that could be raised on twenty-five acres, during a specified season (*Bowman v. Conn*, 8 Ind. 58), all the mules that might be bred from a certain jack during a given season at \$45.00 each (*Carpenter v. Galloway*, 73 Ind. 418), to purchase at \$5.00 per ton all the flax straw that could be raised from forty-five bushels of flax-seed (*Brown v. Sanborn*, 21 Minn. 402), an agreement to furnish turnip-seed to another who agreed to sow it on his own land and sell the crop of seed produced at a specified price where it appeared that that price might exceed \$50.00 (*Watts v. Friend*, 10 Barn. & Cress. 446), it was held that such a contract will be invalid, because such an amount might necessarily exceed the statutory limit, but in other cases this is not regarded as sound doctrine. *Gault v. Brown*, 48 N. H. 183; *Hodges v. Richmond Manuf. Co.*, 9 R. I. 482; *Cox v. Bailey*, 6 Man. & Gr. 193; s. c. 46 Eng. C. L. 192.

² 10 B. & C. 446.

crop of turnip-seed which might or might not amount to 10*l.*, the price stipulated being a guinea a bushel. But the point was not argued nor mentioned by counsel or by the Court.

§ 155. Where a contract includes a sale of goods, and other matters not within the statute, if the goods included in the contract be of the value of 10*l.*, the 17th section of the statute will apply.¹ In *Harman v. Reeve*,² the plaintiff

¹ *Different contracts for one consideration.*—An agreement which is void in part by reason of the Statute of Frauds, and good for the residue, will not support a declaration in which the entire agreement is set out; consequently an oral sale of goods exceeding the statutory limit, together with an agreement to do something else, all for an entire consideration, is within the statute and cannot be enforced. *Fuller v. Reed*, 38 Cal. 99; *Warren v. Chapman*, 105 Mass. 87; *McMullen v. Riley*, 72 Mass. (6 Gray) 500; *Page v. Monks*, 71 Mass. (5 Gray) 492; *Irvine v. Stone*, 60 Mass. (6 Cush.) 508; *Lamb v. Craft*, 63 Mass. (12 Metc.) 353; *Loomis v. Newhall*, 32 Mass. (15 Pick.) 159; *Carleton v. Woods*, 28 N. H. (8 Fost.) 290; *Carleton v. Wither*, 5 N. H. 196; *Harsha v. Reid*, 45 N. Y. 415, 420; *De Beerski v. Paige*, 36 N. Y. 537; *Erben v. Lorillard*, 19 N. Y. 299; *Mackie v. Cairns*, 5 Cow. (N. Y.) 548; s. c. 15 Am. Dec. 477; *Van Alstine v. Wimple*, 5 Cow. (N. Y.) 162; *Duncan v. Blair*, 5 Den. (N. Y.) 196; *King v. Brown*, 2 Hill. (N. Y.) 485; *Crawford v. Morrell*, 8 Johns. (N. Y.) 195; *Thayer v. Rock*, 13 Wend. (N. Y.) 53; *Dock v. Hart*, 7 Watts & S. (Pa.) 172; *Smith v. Smith*, 14 Vt. 440; *Noyes v. Humphreys*, 11 Gratt. (Va.) 636; *Lea v. Barber*, 2 Anstr. 425, note; *Cooke v. Tombs*, 2 Anstr. 420; *Thomas v. Williams*, 10 Barn. & Cres. 664; *Vaughan v. Hancock*, 3 C. B. 760; *Chater v. Beckett*, 7 T. R. 201; *Lexington v. Clarke*, 2 Vent. 223. See *Mechelen v. Wallace*,

7 Ad. & E. 49; *Falmouth v. Thomas*, 1 Crompt. & M. 89; *Hodgson v. Johnson*, El. Bl. & El. 685; s. c. 28 L. J. Q. B. 88; 5 Jur. N. S. 290. As an oral agreement to hire a shop for a year, at a certain rent, and to pay the landlord the amount expended by him for fitting it up (*McMullen v. Riley*, 72 Mass. (6 Gray) 500); as a contract for the purchase of coal and to pay the freight, when void under the statute as to the sale (*Irvine v. Stone*, 60 Mass. (6 Cush.) 508); where R. orally agrees with F. to give him a certain portion of the purchase money, and also a certain piece of land for his services in effecting a sale of other lands, no action will lie either for the money or the land (*Fuller v. Reed*, 38 Cal. 99); but it is held that where an agreement is void in part by the Statute of Frauds, is not necessarily so *in toto*, if the part which is valid can be separated from that which is invalid. See *Boyd v. Eaton*, 44 Me. 51; s. c. 69 Am. Dec. 83; *Haynes v. Nice*, 100 Mass. 327; *Page v. Monks*, 71 Mass. (5 Gray) 492; *Rand v. Mather*, 65 Mass. (11 Cush.) 1; s. c. 59 Am. Dec. 131; *Irvine v. Stone*, 60 Mass. (6 Cush.) 508; *Pecker v. Kennison*, 46 N. H. 488; *Carleton v. Woods*, 28 N. H. (8 Fost.) 290; *Walker v. Lovell*, 28 N. H. (8 Fost.) 138; s. c. 61 Am. Dec. 605; *Mayfield v. Wadsley*, 3 Barn. & Cres. 357; *Wood v. Benson*, 2 Crompt. & J. 94; s. c. 2 Tyrwh. 93; *Ex parte Littlejohn*, 3 Mont. Deac. & De G. 182.

Thus it has been held that an oral promise to pay for past and future

had sold a mare and foal to defendant, with the obligation to agist them at his own expense till Michaelmas, and also to agist another mare and foal belonging to defendant, the whole for 30*l*. Averment of full performance by plaintiff, and breach by defendant. It was admitted that the mare and foal agreed to be sold were above the value of 10*l*. Held, that the contract for the sale was within the 17th section of the statute. *Seemle*, however, that although the contract was entire, and the price indivisible, plaintiff might have recovered the value of the agistment of defendant's mare and foal. *Per Jervis C. J. and Williams J.*³

board of the child of another, at a certain weekly rate, is severable, and so much of it as is not within the Statute of Frauds may be enforced. *Haynes v. Nice*, 100 Mass. 327; and where the plaintiffs sold the defendants intoxicating liquors in violation of the law, and also other goods by a separate sale, and afterwards took a note in payment for the goods, it was held that he might recover the price of the goods legally sold. *Pecker v. Kennison*, 46 N. H. 488. Where an entire stock of goods was sold at one and the same time, each article for a separate and distinct agreed value, if the sale of some of the articles is prohibited by law, the illegality of such sale will not render the transaction void as to the other articles.

Boyd v. Eaton, 44 Me. 51; *Towle v. Blake*, 38 Me. 528; *Carleton v. Woods*, 28 N. H. 290; *Walker v. Lovell*, 28 N. H. 138; s. c. 61 Am. Dec. 605. But a contrary doctrine prevails in some of the states, where it is held that if a part of an entire contract is void under the Statute of Frauds, the sale is void, and that a party will not be permitted to separate the price of an entire agreement and recover on one, the other being void. See *De Beerski v. Paige*, 36 N. Y. 537.

² 25 L. J. C. P. 257; 18 C. B. 586.

³ See, also, *Wood v. Benson*, 2 Cr. & J. 95; and *Astey v. Emery*, 4 M. & S. 263; *Cobbold v. Caston*, 1 Bing. 399; 8 Moo. 456.

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*CHAPTER IV.

OF ACCEPTANCE AND RECEIPT.

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OF THE CONSTRUCTION OF THE WORDS "EXCEPT THE BUYER SHALL ACCEPT PART OF THE GOODS SO SOLD, AND ACTUALLY RECEIVE THE SAME."

§ 156. HAVING considered the meaning of the words "no contract for the sale of any goods, wares, or merchandise for the price of 10l. or upwards," so as to ascertain what contracts are within the 17th section, the next step in the investigation is to inquire into the several conditions required by the law before such contracts "shall be allowed to be good." The language is that they shall not be allowed to be good "except —

- 1 "The buyer shall accept part of the goods so sold, and actually receive the same;"
- *2. "Or give something in earnest to bind the [*127] bargain, or in part payment;"
3. "Or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract or their agents thereunto lawfully authorized."

The first of these exceptions is the subject of the present chapter.

Section I.—WHAT IS AN ACCEPTANCE.

§ 157. In commenting on this clause, Lord Blackburn makes the following remarks:¹—

"If we seek for the meaning of the enactment, judging merely from its words, and without reference to decisions, it seems that this provision is not complied with, unless the two things concur: the buyer must accept, and he must actually receive part of the goods; and the contract will not be good unless he does both. And this is to be borne in mind, for as there may be an actual receipt without any acceptance, so may there be an acceptance without any receipt.² In the absence of authority, and judging merely from the ordinary meaning of language, one would say that an acceptance of part of the goods is an assent by the buyer, meant to be final, that this part of the goods is to be taken by him as his property under the contract, and as so far satisfying the contract. So long as the buyer can, without self-contradiction, declare that the goods are not to be taken in fulfilment of the contract, he has not accepted them. And it is immaterial whether his refusal to take the goods be reasonable or not. If he refuses the goods, assigning grounds false or frivolous, or assigning no reasons at all, it is still clear that he does not accept the goods, and the question is not whether he *ought* to accept, but whether he *has* accepted

¹ Blackburn on Sale, 22, 23.

v. Cameron, 6 Up. Can. Q. B. (O. S.)

² See *Prescott v. Locke*, 51 N. H. 196.

94, 100; *s. c.* 11 Am. Rep. 55; *Grover*

them.³ The question of acceptance or not is a question as to what was the intention of the buyer as signified by his outward acts."⁴

§ 158. "The receipt of part of the goods is the [*128] taking possession *of them. When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of an acceptance, but it is not the same thing; indeed, the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not. If goods of a particular description are ordered to be sent by a carrier, the buyer must in every case receive the package to see whether it answers his order

³ See *Knight v. Mann*, 118 Mass. 143, 145; *Hill v. Heller*, 27 Hun (N. Y.) 416; *Gibbs v. Benjamin*, 45 Vt. 124.

⁴ *Acceptance: act of buyer necessary; mere words not sufficient.*—To constitute an acceptance of goods, something more than mere words is necessary; there must be some act of the parties amounting to a transfer of the possession and an actual receipt by the purchaser so that the seller no longer retains a lien for the price. *Bowers v. Anderson*, 49 Ga. 143; *Young v. Blaisdell*, 60 Me. 272; *Edwards v. Grand Trunk R. Co.*, 54 Me. 105, 111; *Phillips v. Hunnewell*, 4 Me. (4 Greenl.) 376; *Rodgers v. Jones*, 129 Mass. 420; *Safford v. McDonough*, 120 Mass. 290; *Knight v. Mann*, 118 Mass. 143; s. c. 120 Mass. 219; *Howard v. Borden*, 95 Mass. (13 Allen) 299; *Denny v. Williams*, 87 Mass. (5 Allen) 3; *Snow v. Warner*, 51 Mass. (10 Metc.) 136; s. c. 43 Am. Dec. 417; *Dole v. Stimpson*, 38 Mass. (21 Pick.) 384; *Dooley v. Eilbert*, 47 Mich. 615; *Scotten v. Sutter*, 37 Mich. 526; *Harvey v. St. Louis Butchers' Association*, 39 Mo. 211; *Kirby v. Johnson*, 22 Mo. 354, 361; *Shepherd v. Pressey*, 32 N. H. 49, 51; *Carman v. Snick*, 15 N. J. L. (3 J. S. Gr.) 252; *Stone v. Browning*, 68 N.

Y. 601; s. c. 51 N. Y. 211; *Cooke v. Millard*, 65 N. Y. 352, 373; s. c. 22 Am. Rep. 619; *Brewster v. Taylor*, 63 N. Y. 587; *Kein v. Tupper*, 52 N. Y. 550; *Caulkins v. Hellman*, 47 N. Y. 449, 452; s. c. 7 Am. Rep. 461; *Marsh v. Rouse*, 44 N. Y. 643; *Rodgers v. Phillips*, 40 N. Y. 519; *Brabin v. Hyde*, 32 N. Y. 519; *Crofoot v. Bennett*, 2 N. Y. 258; *Shindler v. Houston*, 1 N. Y. 261; s. c. 49 Am. Dec. 316; *Kellogg v. Witherhead*, 6 N. Y. Supr. Ct. (T. & C.) 525; *Ely v. Ormsby*, 12 Barb. (N. Y.) 570; *Hunn v. Bowne*, 2 Cai. (N. Y.) 38; *Jennings v. Webster*, 7 Cow. (N. Y.) 256; *Artcher v. Zeh*, 5 Hill (N. Y.) 205; *Hallenbeck v. Cochran*, 20 Hun (N. Y.) 416; *Moore v. Bixby*, 4 Hun (N. Y.) 802; *Ham v. Van Orden*, 4 Hun (N. Y.) 709; *Bailey v. Ogden*, 3 Johns. (N. Y.) 399, 421; s. c. 3 Am. Dec. 509; *Fitch v. Beach*, 15 Wend. (N. Y.) 221; *Gorham v. Fisher*, 30 Vt. 428; *Dollard v. Potts*, 6 Allen (N. B.) 443; *Doley v. Marks*, Bert. (N. B.) 346; *O'Brien v. Credit Valley R. Co.*, 25 Up. Can. C. P. 275; *Phillips v. Bistolli*, 3 Dowl. & Ryl. 827; s. c. 2 Barn. & Cress. 513; *Hunt v. Hetch*, 8 Exch. 84; s. c. 20 Eng. L. & Eq. 524; 22 L. J. Rep. (N. S.) Exch. 298; *Holmes v. Hoskins*, 9 Exch. 753; s. c. 28 Eng. L. & Eq. 564.

or not: it may even be reasonable to try part of the goods by using them; but though this is a very actual receipt, it is no acceptance so long as the buyer can consistently object to the goods as not answering his order. It follows from this that a receipt of goods by a carrier, or on board ship, though a sufficient delivery to the purchaser, is not an acceptance by him so as to bind the contract, for the carrier, if he be an agent to receive, is clearly not one to accept the goods.”¹

And this is also the law in the United States — *Caulkins v. Hellman*, 47 N. Y. Rep. 449.

§ 159. The decisions upon the question what constitutes an acceptance have been numerous. In a leading case, *Hinde v. Whitehouse*,¹ where sugar had been sold at auction, the defendant, as highest bidder, had received the sample of sugar knocked down to him, and it was proved that at such sales the samples were always delivered to the purchasers as

¹ *Acceptance: what is a sufficient.* —

The acceptance of the goods must be in pursuance of the contract of the sale and with the intention of the parties that the purchaser take possession as owner. See *Young v. Blaisdell*, 60 Me. 272; *Edwards v. Grand Trunk R. Co.*, 54 Me. 105; s. c. 48 Me. 379; *Maxwell v. Brown*, 39 Me. 98; s. c. 63 Am. Dec. 605; *Hewes v. Jordan*, 39 Md. 472; s. c. 17 Am. Rep. 578; *Jones v. Mechanics' Bank*, 29 Md. 287, 293; *Belt v. Mariott*, 9 Gill (Md.) 331; *Rodgers v. Jones*, 129 Mass. 420; *Atherton v. Newhall*, 123 Mass. 141; s. c. 25 Am. Rep. 47; *Remick v. Sandford*, 120 Mass. 309; *Safford v. McDonough*, 120 Mass. 290; *Townsend v. Hargraves*, 118 Mass. 333; *Davis v. Eastman*, 83 Mass. (1 Allen) 422; *Frostburg Mining Co. v. New England Glass Co.*, 63 Mass. (9 Cush.) 115; *Rickey v. Tenbroeck*, 63 Mo. 563; *Kirby v. Johnson*, 22 Mo. 354, 361; *Cunningham v. Ashbrook*, 20 Mo. 553; *Gilman v. Hill*, 36 N. H. 311; *Shepherd v. Pressey*, 32 N. H. 49, 55; *Matthiessen & Weichers' Refining Co. v. McMahon's Adm'r*, 38 N. J. L. (9 Vr.) 536;

Stone v. Browning, 68 N. Y. 598; *Van Woert v. Albany & S. R. R. Co.*, 67 N. Y. 538; *Caulkins v. Hellman*, 47 N. Y. 449; s. c. 7 Am. Rep. 461; *Marsh v. Rouse*, 44 N. Y. 643; *Rodgers v. Phillips*, 40 N. Y. 519; *McKnight v. Dunlop*, 5 N. Y. 537; s. c. 55 Am. Dec. 370; *Brand v. Focht*, 3 Keyes (N. Y.) 409; *Gibbs v. Benjamin*, 45 Vt. 124; *Danforth v. Walker*, 40 Vt. 257; *Rider v. Kelley*, 32 Vt. 268; s. c. 78 Am. Dec. 276; *Bacon v. Eccles*, 43 Wis. 227; *Smith v. Stoller*, 26 Wis. 671; *Garfield v. Paris*, 96 U. S. 557, 566; bk. 24, L. ed. 821.

Acquiescence by the buyer and seller in acceptance is necessary to constitute a valid contract of sale. *Washington Ice Co. v. Webster*, 62 Me. 341; s. c. 16 Am. Rep. 462; *Riddle v. Varnum*, 37 Mass. (20 Pick.) 280; *Carter v. Bingham*, 32 Up. Can. Q. B. 615; *Hamilton v. Terry*, 11 C. B. 954; *Siewwright v. Archibald*, 17 Q. B. 163; *Gether v. Capper*, 15 C. B. 696; s. c. 1 Jur. (N. S.) 332; 24 L. J. C. P. 69; affirmed, 18 C. B. 866; 2 Jur. (N. S.) 789; 25 L. J. C. P. 260.

¹ 7 East, 568. *McNeil v. Keleher*, 15 Up. Can. C. P. 470.

part of their purchase to make up the quantity. This was held to be an acceptance of part of the goods sold, Lord Ellenborough saying, "Inasmuch as the half-pound sample of sugar out of each hogshead in this case is, by the terms and conditions of sale, so far treated as a part of the entire bulk to be delivered, that it is considered in the original weighing as constituting a part of the bulk actually weighed out to the buyer; and to be allowed for specifically if he should choose to have the commodity weighed; I cannot but consider it as a part of the goods sold under the terms of the sale accepted and actually received as such by the buyer. And although it be delivered partly *alio intuitu*, namely, as a sample [*129] of quality, *it does not therefore prevent its operating to another consistent intent, also in pursuance of the purposes of the parties as expressed in the conditions of sale, namely, as a part delivery of the thing itself, *as soon as in virtue of the bargain, the buyer should be entitled to retain, and should retain it accordingly.*"²

§ 160. In *Phillips v. Bistolli*,¹ where a purchaser of some jewelry at an auction sale held it in his hands a few minutes and tendered it back to the auctioneer, saying there had been a mistake, the Court set aside a verdict for plaintiff, and ordered a new trial, saying "to satisfy the statute there

² *Acceptance of sample.*—The mere taking of a sample of the goods purchased is not a sufficient acceptance to satisfy the Statute of Frauds in the absence of an express understanding that it was delivered by the vendor and accepted by the purchaser with a view to change the possession. *Carver v. Lane*, 4 E. D. Smith (N. Y.) 168, 170. A delivery of samples is a compliance with the statute only when they are treated by both parties as a part of the goods sold and as diminishing the quantity or weight thereof to the extent of their bulk. *Moore v. Love*, 57 Miss. 765. See sec. 161, note 4. For samples as such are mere specimens and constitute no part of the goods embraced in a contract of purchase.

Brock v. Knower, 37 Hun (N. Y.) 609, 613; *Carver v. Lane*, 4 E. D. Smith (N. Y.) 168; *Davis v. Lewis*, 7 T. R. 17. Whether the samples are so regarded is a question of fact for the jury, and the burden of establishing the affirmative rests upon the party asserting it. *Moore v. Love*, 57 Miss. 765; *Garfield v. Paris*, 96 U. S. (8 Otto) 557, 563; bk. 24, L. ed. 821; *Bushel v. Wheeler*, 15 Ad. & E. (N. S.) 445; *Simmonds v. Humble*, 13 C. B. N. S. 261; *Parker v. Wallis*, 5 El. & Bl. 21; *Lillywhite v. Devereux*, 15 Mees. & W. 285; *Chit. on Contr.* (10th ed.) 367; *Addison Contr.* (6th ed.) 169 (Am. L. Series, 269). See sec. 162, notes 1 and 3.

¹ 2 B. & C. 511. See, also, *Klinitz v. Surrey*, 5 Esp. 267.

must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee; and there must be an actual acceptance by the latter, *with an intention of taking to the possession as owner.*"²

§ 161. In *Gardner v. Grout*,¹ after the sale agreed on, the buyer went to the vendor's warehouse and got samples of the goods sold, which he promised to pay for when he took away the bulk; and the samples so taken were weighed and entered against him in the vendor's book. The vendor then refused to complete the sale, but *held* that there had been a part acceptance making the bargain complete.

In this case the defendant cited *Simonds v. Fisher*, not reported, in which Wightman J. had nonsuited the plaintiff, the facts being that plaintiff showed defendant samples of wine which the latter agreed to buy, and after the bargain was concluded,² the buyer asked for the samples and wrote

¹ *The act of the vendor alone is not sufficient.* See *Young v. Blaisdell*, 60 Me. 273; *Hewes v. Jordan*, 39 Md. 472; s. c. 17 Am. Rep. 578; *Jones v. Mechanics' Bank*, 29 Md. 287, 293; *Belt v. Marriott*, 9 Gill (Md.) 331; *Remick v. Sandford*, 120 Mass. 316; *Safford v. McDonough*, 120 Mass. 290; *Dole v. Stimpson*, 38 Mass. (21 Pick.) 384; *Shepherd v. Pressey*, 32 N. H. 49, 55; *Messer v. Woodman*, 23 N. H. (2 Fost.) 172, 182; *Hawley v. Keeler*, 53 N. Y. 114; *Stone v. Browning*, 51 N. Y. 211; *Marsh v. Rouse*, 44 N. Y. 643; *Gray v. Davis*, 10 N. Y. 285; *Shindler v. Houston*, 1 N. Y. 261; s. c. 49 Am. Dec. 316; *Brand v. Focht*, 3 Keyes (N. Y.) 409; *Tempest v. Fitzgerald*, 3 Barn. & Ald. 680; *Baldev v. Parker*, 2 Barn. & Cress. 37. *Vide infra*, sec. 162, note 2.

Mere delivery is not sufficient; there must be an acceptance and receipt by the purchaser. See authorities above, and also *Edwards v. Grand Trunk R. Co.*, 54 Me. 105; s. c. 48 Me. 379; *Maxwell v. Brown*, 39 Me. 101; s. c. 63 Am. Dec. 605;

Johnson v. Cuttle, 105 Mass. 449; s. c. 7 Am. Rep. 545; *Broadman v. Spooner*, 95 Mass. (13 Allen) 357; *Denny v. Williams*, 87 Mass. (6 Allen) 3; *Prescott v. Locke*, 51 N. H. 94; s. c. 12 Am. Rep. 55; *Caulkins v. Hellman*, 47 N. Y. 449; s. c. 7 Am. Rep. 461; *Gibbs v. Benjamin*, 45 Vt. 124, 130; *Phillips v. Bistolli*, 2 Barn. & Cress. 518; s. c. 3 Dowl. & Ryl. 822.

² 2 C. B. N. S. 340. See, also, *Klinitz v. Surrey*, 5 Esp. 267; *Talver v. West*, Holt, 178.

³ *Acceptance and receipt must be simultaneous acts; but they need not be simultaneous with the contract of a sale; a delivery and acceptance within a reasonable time being sufficient.* *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Bush v. Holmes*, 53 Me. 417; *Davis v. Moore*, 13 Me. 424; *Hewes v. Jordan*, 39 Md. 484; *Marsh v. Hyde*, 69 Mass. (3 Gray) 331; *Thompson v. Alger*, 53 Mass. (12 Metc.) 435; *Damon v. Osborn*, 18 Mass. (1 Pick.) 480; s. c. 11 Am. Dec. 229; *McCarthy v. Nash*, 14 Minn. 127; *Pinkham v. Mattox*,

on the labels the prices agreed on; and this taking of the samples was relied on as a part acceptance, so as to take the case out of the statute. But the Court, in deciding *Gardner v. Grout*, distinguished it from *Simonds v. Fisher*, saying, "There the buyer never saw the bulk: the things handed to him really were mere samples.³ But here the plaintiff receives part of the very things which he has already bought."⁴

[*130] *So in *Foster v. Frampton*,⁵ the drawing of samples by a vendee from hogsheads of sugar forwarded to him by the vendor, when the sugar was in the carrier's warehouse at the place of destination, was held to be a taking possession of part of the goods, "a complete act of ownership" (*per* Littledale J.), putting an end to the vendor's right of stoppage *in transitu*.

In *Gilliat v. Roberts*,⁶ the defendant having purchased 100 quarters of wheat, sent his servant for three sacks of it, which were delivered, but the contract was for wheat, "not to weigh less than nine and a half stone neat imperial measure, to be made up eighteen stone neat," and the sacks sent had not been tested according to imperial measure, nor had the wheat received the usual final dressing before delivery. On these facts, the defendant, who had not returned the three sacks, maintained that he had kept them under a new implied contract to pay for their value, and not as part of the 100 bushels bought, with which the three sacks did not correspond in description. But *held* that there was but one contract, and that the buyer had actually received and accepted part of the goods sold, so as to take the case out of the statute.

53 N. H. 604; *McKnight v. Dunlop*, 5 N. Y. 537; *Sale v. Darragh*, 2 Hilt. (N. Y.) 184; *Chapin v. Potter*, 1 Hilt. (N. Y.) 366; *Vincent v. Germond*, 11 Johns. (N. Y.) 283; *Sprague v. Blake*, 20 Wend. (N. Y.) 61; *Richardson v. Squires*, 37 Vt. 640; *Danforth v. Walker*, 37 Vt. 239; *Amson v. Dreher*, 35 Wis. 615.

³ See, also, *Cooper v. Elston*, 7 T.

R. 14, where the sample was not part of the bulk.

⁴ *Acceptance of sample when sufficient*.—See sec. 159, note 1, and also *Atwood v. Lucas*, 53 Me. 508; *Bush v. Holmes*, 53 Me. 417, 418; *Pratt v. Chase*, 40 Me. 269; *Davis v. Eastman*, 83 Mass. (1 Allen) 422; *Danforth v. Walker*, 40 Vt. 257.

⁵ 6 B. & C. 107.

⁶ 19 L. J. Ex. 410.

§ 162. It is quite well settled that the acceptance of the goods, or part of them, as required by the statute, may be constructive only, and that the question whether the facts proven amount to a constructive acceptance is one "of fact for the jury, not matter of law for the Court."¹ The acceptance must be clear and unequivocal,² but "it is question for the jury whether, under all the circumstances, the acts which the buyer does, or forbears to do, amount to an acceptance."³ All the cases proceed on this principle.⁴

¹ *Per* Denman C. J. in *Eden v. Dudfield*, 1 Q. B. 302. See sec. 159 and last part of note 1, and also *Frostburg Mining Co. v. New England Glass Co.*, 63 Mass. (9 Cush.) 118; *Simpson v. Krumdick*, 28 Minn. 352; *Pinkham v. Mattox*, 53 N. H. 605.

² See *Boynton v. Veazie*, 24 Me. 286; *Denny v. Williams*, 87 Mass. (5 Allen) 3; *Snow v. Warner*, 51 Mass. (10 Metc.) 136; s. c. 43 Am. Dec. 417; *Dole v. Stimpson*, 38 Mass. (21 Pick.) 384; *Prescott v. Locke*, 51 N. H. 94; s. c. 11 Am. Rep. 55; *Carver v. Lane*, 4 E. D. Smith (N. Y.) 168; *Gibson v. Stevens*, 49 U. S. (8 How.) 384; bk. 12, L. ed. 1123; *Remick v. Sandford*, 120 Mass. 309, 316; *Safford v. McDonough*, 120 Mass. 290, 291; *Knight v. Mann*, 118 Mass. 146; s. c. 120 Mass. 219, 220; *Johnson v. Cuttle*, 105 Mass. 449; s. c. 7 Am. Rep. 545; *Quintard v. Bacon*, 99 Mass. 185; *Frostburg Mining Co. v. New England Glass Co.*, 63 Mass. (9 Cush.) 115; *Snow v. Warner*, 51 Mass. (10 Metc.) 132; s. c. 43 Am. Dec. 471; *Barkley v. Rensselaer & S. R. Co.*, 71 N. Y. 205; *Rogers v. Gould*, 6 Hun (N. Y.) 229; *Vincent v. Germond*, 11 Johns. (N. Y.) 283; *Outwater v. Dodge*, 6 Wend. (N. Y.) 400; *Gibbs v. Benjamin*, 45 Vt. 130; *Spencer v. Hale*, 30 Vt. 314; s. c. 73 Am. Dec. 309; *Barney v. Brown*, 2 Vt. 374; s. c. 19 Am. Dec. 720; sec. 160, note 2.

Acceptance by agent of both parties.—The same person cannot act as an

agent for both the seller and the purchaser in the delivery and acceptance of the goods sold. *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85; *Boatwick v. Atkins*, 3 N. Y. 53; *Hawley v. Cramer*, 4 Cow. (N. Y.) 736; *Clafin v. Farmers' & Citizens' Bank*, 24 How. (N. Y.) Pr. 1, 15; *Caulkins v. Hellman*, 14 Hun (N. Y.) 350; s. c. 47 N. Y. 449; *Torrey v. Bank of Orleans*, 9 Paige Ch. (N. Y.) 663; *Van Eps v. Van Eps*, 9 Paige Ch. (N. Y.) 237; *Story on Agency*, secs. 31, 211.

³ *Per* Coleridge J. in *Bushell v. Wheeler*, 15 Q. B. 442, quoted and approved by *Campbell C. J.* in *Morton v. Tibbett*, 15 Q. B. 428, and 19 L. J. Q. B. 382. See, also, *Parker v. Wallis*, 5 E. & B. 21.

American authorities.—*Sawyer v. Nichols*, 40 Me. 212; *Wartman v. Breed*, 117 Mass. 18; *Borrowscale v. Bosworth*, 99 Mass. 381; *Kirby v. Johnson*, 22 Mo. 354; *Rappleye v. Adey*, 65 Barb. (N. Y.) 589; *Bailey v. Ogden*, 3 Johns. (N. Y.) 399, 420; s. c. 3 Am. Dec. 509.

When a question for the court.—When the facts and intentions of the parties are ascertained, it is for the Court to decide whether by law they constitute an acceptance; but if they are disputed, it is for the jury to determine whether there has been a delivery and acceptance in fact. *Shepherd v. Pressey*, 32 N. H. 49, 57; *Healey v. Tenant*, 13 Ir. C. L. R. 394. See, also, sec. 159, note 1.

§ 163. The constructive acceptance by the buyer may properly be inferred by the jury when he, deals with the

In *Denny v. Williams*, 87 Mass. (5 Allen) 1, 5, it is said that it is for the Court to withhold the facts from the jury when they are not such as can afford any ground for finding an acceptance; and this includes cases where, though the Court might admit that there was a scintilla of evidence tending to show an acceptance, they would still feel bound to set aside a verdict finding an acceptance upon that evidence. By "scintilla of evidence" is here meant those cases where, on a motion for a new trial, a verdict would be set aside as against the weight of the evidence. The Supreme Court of New Hampshire say, in *Pinkham v. Mattox*, 53 N. H. 600, 604, that "the question of acceptance most commonly arises where there has been no actual transfer of the thing from the seller to the buyer, and where a constructive delivery, coupled with some act of the buyer, denoting his purpose to treat it as his property, are relied on to show acceptance; or where either the thing was actually in the hands of the buyer at the time of the contract, or passed into his hands immediately after; and a question is raised whether he consented to hold in pursuance of the contract of sale. Very delicate and troublesome questions may thus be raised; but it is plain they are questions of fact to be determined by a jury, and they seem to have been so treated in all the English cases where there was thought to be more than a 'scintilla of evidence' tending to show an act of ownership from which acceptance could be inferred." *Morton v. Tibbett*, 15 Ad. & E. (N. S.) 428; *Phillips v. Bistolli*, 2 Barn. & Cress. 511; *Cusack v. Robinson*, 1 Best & S. 299; s. c. 7 Jur. N. S. 542; 9 W. K. 735; 30 L. J. Q. B. 261; 4 L. T. (N. S.) 506; *Marvin v. Wallis*, 6 El. & Bl. 726; s. c. 2 Jur.

(N. S.) 689; 25 L. J. Q. B. 369; *Parker v. Wallis*, 5 El. & Bl. 21; *Chaplin v. Rogers*, 1 East, 192; *Saunders v. Topp*, 4 Exch. 390; *Castle v. Sworder*, 6 H. & N. 828; *Blenkinsop v. Clayton*, 7 Taunt. 597; *Elmore v. Stone*, 1 Taunt. 458. In cases where the Court have been of the opinion that there was no evidence (no acts of ownership), from which the jury could legally find an acceptance, the question has been treated and determined as one of law. *Carter v. Tous-saint*, 5 Barn. & Ald. 855; *Hanson v. Armitage*, 5 Barn. & Ald. 557; *Tempest v. Fitzgerald*, 3 Barn. & Ald. 680; *Howe v. Palmer*, 3 Barn. & Ald. 321; *Thompson v. Maceroni*, 3 Barn. & Cress. 1; *Holmes v. Hoskins*, 9 Exch. 753; *Hunt v. Hecht*, 8 Exch. 814; *Coombs v. Bristol & E. R. Co.*, 3 H. & N. 510; *Farina v. Home*, 16 Mees. & W. 119; *Norman v. Phillips*, 14 Mees. & W. 277. In *Beaumont v. Brengeri*, 5 C. B. 301, it was held, as a matter of law, that certain acts of the buyer constituted an acceptance.

⁴ *What constitutes an acceptance.*—The Supreme Court of Iowa say in *Brown v. Wade*, 42 Iowa, 647, 650, that "what constitutes a delivery depends largely upon the character and situation of the property; the delivery of the keys of a warehouse, or an entry in the books of a warehouse-keeper, or delivery with indorsement of a bill of lading with a receipt, constitutes such a delivery as will satisfy the Statute of Frauds; and even less than this may be a delivery and acceptance where the goods are bulky and difficult of access and removal;" "that if the seller takes in any goods, it is usual that what the nature of the goods makes convenient and proper to pass the effectual control of the goods from the seller to the buyer, this is always a delivery." 3 Pars. on Cont. 44; Story

on Sales (4th ed.) 282. In this case, in a sale of land, the vendor pointed out certain cattle of his which were running with others in a pasture, and designated their price, and the vendee agreed to take them as they were, and at a stipulated price; the court held that this constituted a delivery of the cattle, and took the sale out of the Statute of Frauds. But this doctrine is hardly in harmony with adjudicated cases. See *Walden v. Murdock*, 23 Cal. 540, 550. *Vide ante*, 157, note 4, and 158, note 1.

In the case where no acceptance is prohibited, the purchaser should either make part payment or sign a contract. *Shindler v. Houston*, 1 N. Y. 261; s. c. 49 Am. Dec. 316. But in a case where there was an oral sale of cotton in a warehouse, and a written order on the warehouseman, where the goods were stored, was delivered to the purchaser, the warehouseman notified, and no other acts done, this was held to constitute a delivery and acceptance. *King v. Jarman*, 35 Ark. 190; s. c. 37 Am. Rep. 11. Symbolical delivery will be sufficient, and is in most cases an equivalent in its legal effect to actual delivery. *Stevens v. Stewart*, 3 Cal. 140; *Calkins v. Lockwood*, 17 Conn. 154, 170; s. c. 42 Am. Dec. 769; *Vining v. Gilbreth*, 39 Me. 496; *Atwell v. Miller*, 6 Md. 10; s. c. 69 Am. Dec. 206; *Packard v. Dunsmore*, 65 Mass. (11 Cush.) 282; *Carter v. Willard*, 36 Mass. (19 Pick.) 1, 9; *Gray v. Davis*, 10 N. Y. 285, 292; *Shindler v. Houston*, 1 N. Y. 261; s. c. 49 Am. Dec. 361; *Benford v. Schell*, 55 Pa. St. 393; *Ryall v. Rolle*, 1 Atk. 171; *Harman v. Anderson*, 2 Camp. 243; *Chaplin v. Rogers*, 1 East, 192; *Manton v. Moore*, 7 T. R. 67, 71.

Acceptance by joint purchaser.—An acceptance by one of two or more joint purchasers will be for the benefit of all and sufficient to take the case out of the Statute of Frauds. *Field v. Runk*, 22 N. J. L. (2 Zab.) 525; *Vincent v. Germond*, 11 Johns.

(N. Y.) 283; *Smith v. Milliken*, 7 Lans. (N. Y.) 336. A contrary rule prevails in Michigan. See *Grimes v. Van Vechten*, 20 Mich. 410; *Chamberlain v. Dow*, 10 Mich. 319.

Acceptance: acts of ownership as evidence of.—Where a purchaser exercises any acts of ownership of the goods purchased, his acts, which are hostile to the rights of the vendor as owner, will indicate an acceptance of them, such as examining them and setting aside, having them marked with his own mark, and the like. *Barkalow v. Pfeiffer*, 38 Ind. 214; *Atherton v. Newhall*, 123 Mass. 141; s. c. 25 Am. Rep. 47; *Townsend v. Hargraves*, 118 Mass. 325; *Delventhal v. Jones*, 53 Mo. 460; *Pinkham v. Mattox*, 53 N. H. 600, 603; *Stone v. Browning*, 68 N. Y. 600; *Vincent v. Germond*, 11 Johns. (N. Y.) 283; *Bacon v. Eccles*, 43 Wis. 238; *Garfieid v. Paris*, 96 U. S. (6 Otto) 557; bk. 24, L. ed. 821; *Safford v. Downing*, 2 Low. C. C. 563; *Ballard v. Potts*, 6 Allen (N. B.) 443.

Resale: acceptance implied by.—Where there is a sale of the whole or a part of the goods purchased, this is such an exercise of ownership over the property as will take the contract out of the Statute of Frauds in the absence of an actual delivery. *Marshall v. Ferguson*, 23 Cal. 65, 69; *Phillips v. Ocmulgee Mills*, 55 Ga. 633, 637; *Hill v. McDonald*, 17 Wis. 97, 101; *Chaplin v. Rogers*, 1 East, 192; *Browne on Statute of Frauds*, secs. 250, 258. See *Marshall v. Green*, L. R. 1 C. P. Div. 35, 43. But it was held in *Jones v. Mechanics' Bank*, 29 Md. 287, 297, that the fact that a defendant offered to sell goods bargained for, with the privilege of inspection at their place of destination, in anticipation of their arrival, does not amount to such assumption of authority or assertion of ownership over them as to constitute such an acceptance and receipt of the goods as the Statute of Frauds requires, where goods are sold un-

goods as owner, when he does an act which he would [*131] have authority * to do as owner, but not otherwise.¹

In the language of an eminent judge,² "if the vendee does any act to the goods, of wrong, if he is not owner of the goods, and of right, if he is owner of the goods, the doing of that act is evidence that he has accepted them."

Thus, in *Chaplin v. Rogers*,³ where the purchaser of a stack of hay resold part of it, and in *Blenkinsop v. Clayton*,⁴ where the purchaser of a horse took a third person to the vendor's stable, and offered to resell the horse to the third person at a profit, the buyer was held in both instances to have done an act inconsistent with the continuance of a right of property in his vendor, and to have accepted within the meaning of the statute.⁵

der a verbal contract. The same doctrine was held in *Clarkson v. Noble*, 2 Up. Can. Q. B. 361. See, also, *Smith v. Surman*, 9 Barn. & Cres. 561; *Flintoft v. Elmore*, 18 Up. Can. C. P. 274.

Receipt of goods by carrier is not an acceptance unless the carrier has been designated by the purchaser, and the delivery made to him in pursuance of the contract of sale. See sec. 152, note 3, and also, *Rodgers v. Phillips*, 40 N. Y. 530; *Spencer v. Hale*, 30 Vt. 316; s. c. 73 Am. Dec. 309. See, also, *Denmead v. Glass*, 80 Ga. 637; *Lloyd v. Wright*, 20 Ga. 574; s. c. 25 Ga. 215; *Keiwert v. Meyer*, 62 Ind. 587; *Hausman v. Nye*, 62 Ind. 485; *Maxwell v. Brown*, 39 Me. 98; s. c. 63 Am. Dec. 605; *Jones v. Mechanics' Bank*, 29 Md. 287; *Atherton v. Newhall*, 123 Mass. 141; s. c. 25 Am. Rep. 47; *Johnson v. Cuttle*, 105 Mass. 447; s. c. 7 Am. Rep. 545; *Quintard v. Bacon*, 99 Mass. 185; *Frostburg Mining Co. v. New England Glass Co.*, 63 Mass. (9 Cush.) 115; *Grimes v. Van Vechten*, 20 Mich. 410; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17; *Allard v. Greasert*, 61 N. Y. 1; *Tower v. Tudhope*, 37 Up. Can. Q. B. 200, 210.

Acceptance by authorized agent will

bind the contract. *Quintard v. Bacon*, 99 Mass. 185; *Snow v. Warner*, 51 Mass. (10 Metc.) 132; s. c. 43 Am. Dec. 417; *Barkley v. Rensselaer & S. R. R. Co.*, 71 N. Y. 205; *Allard v. Greasert*, 61 N. Y. 1; *Gray v. Davis*, 10 N. Y. 285; *Rogers v. Gould*, 6 Hun (N. Y.) 229; *Outwater v. Dodge*, 6 Wend. (N. Y.) 397; *Tower v. Tudhope*, 37 Up. Can. Q. B. 200, 210.

An acceptance by an agent of both parties will not be valid. See sec. 162, note 2.

¹ *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Dollard v. Potts*, 6 Allen (N. B.) 443; *Phillips v. Merritt*, 2 Up. Can. C. P. 513; *Tower v. Tudhope*, 37 Up. Can. Q. B. 200; *Marshall v. Green*, L. R. 1 C. P. Div. 35, 41.

² *Erie J. in Parker v. Wallis*, 5 E. & B. 21.

³ 1 East, 195.

⁴ 7 Taunt. 597. See, also, *Lilly-white v. Devereux*, 15 M. & W. 285; and *Baines v. Jevons*, 7 C. & P. 288.

⁵ *Sale of trees. Acceptance.*—A sale of growing timber to be taken away as soon as possible by the purchaser is not a contract for the sale of land nor of any interest in land, within the prohibition of the Statute of Frauds. *Vide* "Fructus naturalis." In a case where a man sold trees to an-

§ 164. In *Beaumont v. Brengeri*,¹ where the defendant bought a carriage from plaintiff, and ordered certain alterations made, and then sent for the carriage and took a drive in it, after telling plaintiff that he intended to take it out a few times so as to make it pass for a second-hand carriage on exportation, *held*, that the defendant had thereby assumed to deal with it as his own, had accepted it, and could not refuse to take it, although it had been sent back and left in the plaintiff's shop.

But in *Maberly v. Sheppard*,² the action was for goods sold *and delivered*, and it was proven that the defendant ordered a wagon to be made for him by plaintiff, and during the process of the work furnished the iron work and sent it to plaintiff, and sent a man to help plaintiff in fitting the iron to the wagon, and afterwards bought a tilt, and sent it to the plaintiff to be put on the wagon. It was insisted by plaintiff that the defendant had thereby exercised such dominion over the goods sold as amounted to acceptance. The Court took time to consider, and Tindal C. J. delivered the decision that the plaintiff had been rightly non-

other by verbal contract, to be removed as soon as possible and the purchaser in pursuance of the contract felled some of the trees and sold the tops and stumps to a third person, it was held that this was a sufficient acceptance to take the case out of the Statute of Frauds. The court say: "If the sub-sale stood alone, I should have doubted whether it would have been evidence of an actual receipt, but here he did something to the trees themselves; I should be inclined to say that where there is no actual removal of the things sold, the question depends upon this proposition, viz., that where there has been during the existence of the verbal contract, for however short a time, an actual possession of the things sold, and something has been actually done to the things themselves by the buyer, which could only properly be done by an absolute owner, there is

evidence to go to a jury, of an actual receipt of the goods. This principle will, I think, be found to be the governing principle in all the decided cases. Thus, for instance, where goods are handed over the counter of the purchaser, where casks, though not taken away, have had their spigots cut off by the purchaser, and in other similar cases there has been an actual possession by the buyer, and something actually done to the goods themselves, by him, which could only properly be done by an absolute owner; here by cutting down the trees the defendant actually did something to them, which apart from the sale over of the toppings, amounted in my opinion to an actual receipt of them. *Marshall v. Green*, L. R. 1 C. P. Div. 35, 43.

¹ 5 C. B. 301.

² 10 Bing. 99.

[*132] suited, * because the acts of the defendant had not been done after the wagon was finished and capable of delivery, but merely while it was in progress; so that it still remained in plaintiff's yard for further work till it was finished. "If the wagon had been completed and ready for delivery, and the defendant had then sent a workman of his own to perform any additional work upon it, such conduct on the part of the defendant might have amounted to an acceptance."³

§ 165. In *Parker v. Wallis*,¹ the defendants received some turnip-seed under a verbal contract of sale, but sent word at once to plaintiff that it was "out of condition;" this was denied by plaintiff, who refused to receive it back. The defendants then took the seed out of the bags, and laid it out thin, alleging that it was hot and mouldy, and that plaintiff had given them authority to do so; both these facts were denied by plaintiff. Plaintiff was nonsuited by Wightman J. and leave reserved to enter a verdict for 140%, the price of the seed, if the evidence sufficed to show acceptance and actual receipt of any part of the goods. The Court made the rule absolute for a new trial, but refused to enter verdict for plaintiff. Held, that the act of taking the seed out of the bags was susceptible of various constructions. It might have been because the seed was hot, or because the plaintiff had authorized it. But, as the evidence stood, when the nonsuit was ordered, these were not the facts. There remained a third construction, namely, that spreading out the seed was an act of ownership, a wrongful act, if the defendants had not accepted as owners. This was a question for the jury.

In *Kent v. Huskisson*,² there was an actual receipt, but no acceptance. The buyer gave an order for sponge, at 11s. per pound. On arrival of the package it was examined, and judged to be worth not more than 6s. per pound. He at once returned it by the same carrier. Held, no acceptance.

¹ See *Halterline v. Rice*, 62 Barb. (N. Y.) 593; *Flintoft v. Elmore*, 18 Up. Can. C. P. 274.

² 5 E. & B. 21.

³ 3 B. & P. 283.

§ 166. A dealing with goods, so as to justify a jury in finding a constructive acceptance, may take place as effectively with *the bill of lading, which represents [*133] the goods, as with the goods themselves.¹

§ 167. Very deliberate consideration was given to the whole subject by the Queen's Bench, in the important case of *Morton v. Tibbett*.¹ The facts were that on the 25th of August, defendant made a verbal agreement with plaintiff for the purchase of fifty quarters of wheat according to sample, each quarter to be of a certain specified weight. Defendant, by agreement, sent a general carrier next morning to a place named, and the wheat was then and there received on board of one of the carrier's lighters, for conveyance by canal to Wisbeach, where it arrived on the 28th. In the meantime, on the 26th, the defendant resold the wheat by the same sample, and on the understanding that it was to be of the same weight per quarter as had been agreed with plaintiff, and the wheat upon arrival was examined and weighed by the second purchaser and rejected, because found to be of short weight. Defendant thereupon wrote to plaintiff on the 30th, also rejecting the wheat for short weight. The wheat remained in possession of the carrier, who had received it without its being weighed, and neither defendant, nor any one in his behalf had seen it weighed. The action was debt for goods sold and delivered, and goods bargained and sold. Verdict for plaintiff, with leave reserved to move for nonsuit. The judgment of the Court was unanimous after taking time for consideration, the point for decision being whether the verdict was justified by any evidence that defendant had accepted the goods, and actually received the same, so as to render him liable as buyer.

Lord Campbell said that it would be very difficult to reconcile the cases on the subject, and that the exact words of

¹ *Currie v. Anderson*, 29 L. J. Q. B. 87, and 2 E. & E. 592; *Meredith v. Meigh*, 22 L. J. Q. B. 401, and 2 E. & B. 364. See, also, *Quintard v. Bacon*, 99 Mass. 186; *Frostburg Mining Co. v. New England Glass Co.*, 92 Mass. (9 Cush.) 116.
¹ 19 L. J. Q. B. 382, and 15 Q. B. 428. See *Meredith v. Meigh*, 2 E. & B. 364; *McMaster v. Gordon*, 20 Up. Can. C. P. 16.

the 17th section had not always been kept in recollection. After referring to the language, he added: "The acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the [*134] * goods; and is not to be a subsequent act after the goods have been actually received, weighed, measured, or examined. As the Act of Parliament expressly makes the acceptance and actual receipt of any *part* of the goods sold sufficient, it must be open to the buyer to object, at all events, to the quantity and quality of the *residue*; and even where the sale is by sample, that the residue offered does not correspond with the sample." His lordship then continued, by announcing that: "We are of opinion that there may be an acceptance and receipt within the meaning of the Act without the buyer having examined the goods, or done anything to preclude him from contending that they do not correspond with the contract. The *acceptance to let in parol evidence of the contract appears to us to be a different acceptance from that which affords conclusive evidence of the contract having been fulfilled.*"²

² *Acceptance without receipt.*—Lord Campbell's propositions have found but partial favor with the judges of Westminster Hall; and while it may be said to be the established construction of the statute by the Court of Queen's Bench, it has failed to receive the sanction of the Court of Exchequer. *Hewes v. Jordan*, 39 Md. 472; s. c. 17 Am. Rep. 578. See *Coombs v. Bristol & E. R. Co.*, 3 H. & N. 510; *Hunt v. Hecht*, 8 Ex. 814. The act of acceptance is not confined to any particular order of time in reference to the actual receipt of the goods; it may precede as well as be contemporaneous with the actual receipt of the goods. *Hewes v. Jordan*, 39 Md. 472; s. c. 17 Am. Rep. 578. See, also, *Simpson v. Krumdick*, 28 Minn. 352; *Cross v. O'Donnell*, 44 N. Y. 661; s. c. 4 Am. Rep. 721; *Cusack v. Robinson*, 1 B. & S. 299; *Kershaw v. Ogden*, 3 Hurl. &

Colt. 717. But where the seller relies on an acceptance by the buyer to take the sale out of the Statute of Frauds, he must show some unequivocal act of acceptance. If the goods were sold by sample it is not enough for him to show merely that the goods came into the possession of the buyer and that they corresponded with the sample. *Remick v. Sandford*, 120 Mass. 309. See *Garfield v. Paris*, 96 U. S. (6 Otto) 557, 562; bk. 24, L. ed. 821. Very delicate and troublesome questions which are to be determined by the jury where there is thought to be more than a scintilla of evidence tending to show an act of ownership from which acceptance could be inferred. See *Pinkham v. Mattox*, 53 N. H. 600; *Bushel v. Wheeler*, 15 Ad. & E. N. S. 445; *Morton v. Tibbett*, 15 Ad. & E. N. S. 428; *Phillips v. Bistolli*, 2 B. & C. 511; *Cusack v. Robinson*, 1 B. &

§ 168. The distinction pointed out in this last clause is important, and should not be lost sight of. The question presented to the Court may be, whether there was a contract, or it may be whether the contract was fulfilled. It is sufficient to show an acceptance and actual receipt of a part, however small, of the thing sold (as, for instance, the half-pound of sugar, in *Hinde v. Whitehouse*),¹ in order that the contract may "be allowed to be good;" and yet the purchaser may well refuse to accept the delivery of the bulk, not because there is not a valid contract proven, but because the vendor fails to comply with the contract as proven,

The decision of Lord Campbell then closed with declaring: "We are therefore of opinion that although the defendant had done nothing which would have precluded him from objecting that the wheat delivered to the carrier was not according to the contract, there was evidence to justify the jury in finding that the defendant accepted and received it."²

§ 169. There was very plain evidence that the defendant *received* it, but the only proof of *acceptance* was the

S. 299; *Simmonds v. Humble*, 13 C. B. N. S. 258; *Chaplin v. Rogers*, 1 East, 192; *Marvin v. Wallis*, 6 E. & B. 726; *Parker v. Wallis*, 5 E. & B. 21; *Saunders v. Topp*, 4 Exch. 390; *Castle v. Sworder*, 6 H. & N. 828; *Lillywhite v. Devereux*, 15 Mees. & W. 285; *Blenkinsop v. Clayton*, 7 Taunt. 597; *Elmore v. Stone*, 1 Taunt. 458. But where there is no evidence from which the jury might legally find an acceptance, the question has been treated and determined as one of law, in which case it is for the court. *Hanson v. Armitage*, 5 Barn. & Ald. 557; *Carter v. Toussaint*, 5 Barn. & Ald. 855; *Tempest v. Fitzgerald*, 3 Barn. & Ald. 680; *Howe v. Palmer*, 3 Barn. & Ald. 321; *Thompson v. Maceroni*, 5 Barn. & Cress. 1; *Holmes v. Hoskins*, 9 Exch. 753; *Hunt v. Hecht*, 8 Exch. 814; *Coombs v. Bristol & E. R. Co.*, 3 H. & N. 510; *Beaumont v. Brengeri*, 3 M. G. & S.

305; *Farina v. Home*, 16 Mees. & W. 119; *Norman v. Phillips*, 14 Mees. & W. 277.

¹ 7 East, 558.

² *Formation and performance of contract*. — There is a well-defined and broad distinction between the principle applicable to the formation and performance of a contract. *Garfield v. Paris*, 96 U. S. (6 Otto) 557, 562; bk. 24, L. ed. 821. See, also, *Remick v. Sandford*, 120 Mass. 309, 316.

Mere possession. — Acceptance cannot be inferred as a matter of law merely from the circumstances that the goods have come into the possession of the purchaser. *Remick v. Sandford*, 120 Mass. 309, 316. See *Tower v. Tudhope*, 37 Up. Can. Q. B. 200, 211; *McMaster v. Gordon*, 20 Up. Can. C. P. 16; *Hunt v. Hecht*, 8 Exch. 814; *Curtis v. Pugh*, 10 Q. B. 111.

[*135] fact of the resale * before examination. The decision, therefore, goes no farther, it would seem, than to determine that this was such an exercise of dominion over goods bought as is inconsistent with a continuance of the right of property in the vendor, and therefore evidence to justify a jury in finding acceptance as well as actual receipt by the buyer.¹ Martin B. in *Hunt v. Hecht*,² declared that this was the whole scope of the decision; and again, in *Coombs v. Bristol and Exeter Railway Company*,³ expressed his dissent from the principles maintained in the opinion pronounced by Lord Campbell. In *Castle v. Swarder*,⁴ Cockburn C. J. said: "It must not be assumed that I assent to the decision in *Morton v. Tibbett*."

§ 170. On the other hand, Blackburn J. in delivering the opinion of the Court in *Cusack v. Robinson*,¹ on the 25th of May, 1861, just ten days after this observation of the Chief Justice in *Castle v. Swarder*, cites *Morton v. Tibbett* as authority for the proposition — "that the acceptance is to be something which is to precede, or at any rate to be contemporaneous with, the actual receipt of the goods, and is not to be a subsequent act, after the goods have been actually received, weighed, measured, or examined." The Court on this occasion, was composed of only two judges, Blackburn and Hill JJ. In the same Court, in February, 1860, Crompton J. had stated, in the case of *Currie v. Anderson*,² that "before the case of *Morton v. Tibbett*, there was authority for saying that there could have been no acceptance and receipt within the Statute of Frauds until the vendee had been placed in such connection with the goods that he could not object to them on account of their quantity and quality; and in that case Lord Campbell says, if that is the law, it would be de-

¹ *Remick v. Sandford*, 120 Mass. 316.

² 8 Ex. 814.

³ 3 H. & N. 510; 27 L. J. Ex. 401.

⁴ 6 H. & N. 832; 30 L. J. Ex. 310.

¹ 1 B. & S. 299, and 30 L. J. Q. B. 261.

² 2 E. & E. 592; 29 L. J. Q. B. 87.

See, also, *Edwards v. Grand Trunk R.*

Co., 54 Me. 105, 111; s. c. 48 Me. 379; *Maxwell v. Brown*, 39 Me. 98; s. c. 63 Am. Dec. 606; *Shepherd v. Pressey*, 32 N. H. 49; *Shindler v. Houston*, 1 N. Y. 261; s. c. 49 Am. Dec. 316; *Outwater v. Dodge*, 6 Wend. (N. Y.) 400; *Phillips v. Bistolli*, 2 Barn. & Cress. 513; s. c. 3 Dowl. & Ryl. 822.

cisive against the plaintiff, but after a careful review of the cases, the Court came to the conclusion (which, in this Court, must be considered to *be the law of the [*186] land), that in order to make an acceptance and receipt within the Statute of Frauds, *it is not necessary that the vendee should have done anything to preclude himself from objecting to the goods.*³ That was the decision in *Morton v. Tibbett*, and from the discussion to-day, I have more reason than ever to be satisfied with it."

§ 171. It is fair to assume from the foregoing review, that, notwithstanding the observation of Cockburn C. J. in *Castle v. Sworder*, the law is considered to be settled in the Court of the Queen's Bench in conformity with the decision in *Morton v. Tibbett*, and that the authority of that case remains unshaken in that Court.

§ 172. In the Exchequer, however, the leaning of the judges is evidently adverse to the construction placed in the Queen's Bench upon this clause of the statute, though in no case has there been a decided rejection of the authority of *Morton v. Tibbett*.

*Hunt v. Hecht*¹ was decided in 1858, and, therefore, prior to the more recent cases in which the judges of the Queen's Bench showed what was, in the opinion of that Court, the full extent of the decision in *Morton v. Tibbett*. The facts were, that a number of bags of bone were sent by defendant's order to his wharfinger, in compliance with a verbal contract with plaintiff. The defendant went to plaintiff's warehouse, and there inspected a heap of ox-bones mixed with others

³ Right to reject goods because they do not correspond with the sample or those bargained for is not defeated by delivery. See *Edwards v. Grand Trunk R. Co.*, 54 Me. 105, 111; *Maxwell v. Brown*, 39 Me. 98; s. c. 63 Am. Dec. 605; *Hewes v. Jordan*, 39 Md. 472; s. c. 17 Am. Rep. 578; *Frostburg Mining Co. v. New England Glass Co.*, 63 Mass. (9 Cush.) 115; *Stone v. Browning*, 51 N. Y. 211; *Caulkins v. Hellman*, 47 N. Y. 449;

s. c. 7 Am. Rep. 461; *Heermance v. Taylor*, 14 Hun (N. Y.) 149; *Tower v. Tudhope*, 37 Up. Can. Q. B. 200, 211; *Morton v. Tibbett*, 15 Ad. & El. N. S. 428; *Curtis v. Pugh*, 10 Ad. & El. N. S. 111; *Smith v. Hudson*, 6 B. & S. 435; *Currier v. Anderson*, 2 E. & E. 592, 600; *Lucy v. Mouffet*, 5 H. & N. 229; *Holmes v. Hoskins*, 9 Exch. 753; s. c. 28 Eng. L. & Eq. 564.

¹ 8 Ex. 814; 22 L. J. Ex. 293.

inferior in quality. Defendant objected to the latter, but verbally agreed to purchase a quantity of the others, to be separated from the rest, and ordered them to be sent to his wharfinger. The bags were received on the 9th, and examined next day by the defendant, as soon as he heard of their being sent to the wharf, and he at once refused to accept them. Held, no acceptance. All the judges put the case on the ground of the goods sold having been mixed in bulk with others, so that no acceptance was possible till after separation, and there was no pretence that there had [*137] been an acceptance after *separation, otherwise than by the wharfinger's receipt, which was insufficient for that purpose, but Martin B. said: "There are various authorities to show that for the purpose of an acceptance within the statute, the vendee must have had the opportunity of exercising his judgment with respect to the articles sent. *Morton v. Tibbett* has been cited as an authority to the contrary, but in reality that case decides no more than this, that where the purchaser of goods takes upon himself to exercise dominion over them, and deal with them in manner inconsistent with the right of property being in the vendor, that is evidence to justify the jury in finding that the vendee has accepted the goods, and actually received the same. The Court, indeed, there say that there may be an acceptance and receipt within the statute, although the vendee has had no opportunity of examining the goods, and although he has done nothing to preclude himself from objecting that they do not correspond with the contract. But in my opinion, an acceptance, to satisfy the statute, must be something more than a mere receipt; *it means some act done, after the vendee has exercised, or had the means of exercising, his right of rejection.*"²

² Opportunity for rejection must always be allowed. See § 170, notes 1 and 2. Also, *Cusack v. Robinson*, 1 B. & S. 299; *Bog Lead Mining Co. v. Montague*, 10 C. B. N. S. 481, 489.

Specific articles, what sufficient evidence of acceptance. *Knight v. Mann*, 118 Mass. 143; *Weld v. Came*,

98 Mass. 153; *Chapman v. Searle*, 20 Mass. (3 Pick.) 38; *Cusack v. Robinson*, 1 B. & S. 299; *Bog Lead Mining Co. v. Montague*, 10 C. B. N. S. 480; *Coombs v. Bristol & E. R. Co.*, 3 H. & N. 510; *Farina v. Home*, 16 Mees. & W. 119. There must be some unequivocal acts showing acceptance or

§ 173. In the case of *Coombs v. The Bristol and Exeter Railway Company*, decided in 1858, the same Court had occasion to review the subject, and Pollock C. B. said that *Hunt v. Hecht* had decided "that the vendee should have an opportunity of rejecting the goods. The statute requires not only delivery but acceptance." Martin B. said, "No doubt in *Morton v. Tibbett* the Court of Queen's Bench carried out the principle of constructive acceptance to an extent which in that case was correct: but I adhere to that which I said in *Hunt v. Hecht*, that much that is there said is doubtful, and that acceptance, to satisfy the statute, must be after the opportunity of exercising an option, or after the doing of some act waiving it." Bramwell B. said without qualification, "The cases establish that there can be no acceptance where there has been no opportunity of rejecting." Watson B. concurred.

*§ 174. The subject of acceptance under the statute again arose in *Smith v. Hudson*,¹ decided in the Queen's Bench in Easter Term, 1865. All the cases were reviewed by able counsel, and commented on by the judges in the course of the argument. The plaintiffs were assignees of Willden, a bankrupt. The defendant, on the 3d of November, 1863, sold to Willden by verbal contract a quantity of barley, according to sample. The bulk was conveyed by the vendor in his own wagons to the railway station, on the 7th of November, and he gave orders to convey and deliver it to the purchaser. It was admitted that by the custom of the trade the purchaser, notwithstanding the delivery of the bulk at the station, had the power of rejecting the goods if found not equal to sample. On the 9th of November Willden was adjudicated a bankrupt on his own petition, without having given any orders or directions about

from which an acceptance may properly be inferred, and they must relate to some dealing with the property by the owner or his authorized agent, after the delivery of the whole or a part of it. *Knight v. Mann*, 118 Mass. 143, 146; *Ross v. Welch*, 77 Mass. (11 Gray) 235; *Ullman v.*

Barnard, 73 Mass. (7 Gray) 554; *Marsh v. Hyde*, 69 Mass. (3 Gray) 331; *Chaplin v. Rogers*, 1 East, 192; *Currie v. Anderson*, 2 E. & E. 592; *Morton v. Tibbett*, 15 Q. B. 428; *Blenkinsop v. Clayton*, 7 Taunt. 597.

¹ 6 B. & S. 431; 34 L. J. Q. B. 145.

the barley, which still remained at the railway station, nor had he examined it, or given any notice whether he accepted or declined it. Nothing had been paid on account of the price, and on the 11th of November the vendor gave notice to the railway company not to deliver the goods to any one but himself. The corn was given up to the vendor by the Company, and the assignees of Willden claimed it as the property of the bankrupt. On the question whether there had been an acceptance under the Statute of Frauds, *held* by all the judges, Cockburn C. J., Blackburn, Mellor, and Shee JJ., that the contract could not be allowed to be good. The Chief Justice held *Hunt v. Hecht* to be binding on the Court as an authority that where the buyer has a right to inspect the articles sold to see whether they are in accordance with the contract, there is no acceptance till he has time to make the inspection. Blackburn J. said, "There must be both acceptance and receipt to bind both purchaser and vendor under the statute." And in all the opinions it was held that the countermand of the vendor before the goods had been delivered according to his order, and before acceptance, put an end to the contract, and deprived the assignees of the power to accept, on behalf of the bankrupt.

[*139] *§ 175. [The authority of *Morton v. Tibbett* was fully recognized, and its principle adopted by the Court of Appeal in the case of *Kibble v. Gough*, decided in 1878.¹ The plaintiff verbally agreed to sell barley to the defendant, the same to be well dressed and equal to sample. In the defendant's absence his foreman received the barley, which was delivered in several instalments, examined it, and gave a receipt for each instalment, with the words, "not equal to sample." The defendant afterwards personally examined the barley, and rejected it on the ground that it was not properly dressed and not equal to sample.

In an action for goods sold and delivered the jury found, in answer to questions left to them by Pollock B. at the

¹ 38 L. T. N. S. 204. See, also, 391, where, however, the decision in *Grimoldby v. Wells*, L. R. 10 C. P. turned upon another point.

trial: 1st, that there was an acceptance by the defendant of part of the barley: and 2dly, that the barley was equal to sample and properly dressed. Upon the argument of a rule for a new trial, obtained on the ground of misdirection, and that the verdict was against the weight of evidence, it was argued for the defendant that there was misdirection on the part of the judge in holding that there was any evidence to go to the jury of acceptance under the Statute of Frauds, upon the ground apparently² that the defendant's foreman having given a receipt with the words "not equal to sample" upon it, could not be held to have accepted it within the meaning of the statute, and that the question therefore, whether it was equal to sample or not, never arose, because there was no valid contract between the parties. The authority of *Morton v. Tibbett* was attacked, but all the Lords Justices (Bramwell, Brett, and Cotton) referred with approval to the principle there laid down, and held that there was evidence for the jury of an acceptance sufficient to satisfy the statute. That being so, the question whether the barley was equal to sample or not was clearly one for the jury to decide, and they had answered it in favor of the plaintiff. Lord Justice Brett refers in these terms to the acceptance necessary under the statute: "There must be an *acceptance and an actual receipt; *no absolute* [*140] *acceptance but an acceptance which could not have been made except on admission of the contract, and that the goods were sent under it.* I am of opinion there was a sufficient acceptance under the Statute of Frauds, although there was (still) a power of rejection." And then, after reviewing the cases, and referring with approval to *Morton v. Tibbett*, he adds: "The goods then were sold *by valid contract*, actually delivered and received, and after this the vendee objects to them. *If they have not been equal to the sample, I say that it was not even then too late to object*; but they were equal to sample and they were (properly) dressed."

And Cotton L. J. says, "All that is wanted is a receipt, and such an acceptance of the goods as shows that it *has*

² The report is somewhat involved.

regard to the contract: but the contract may yet be left open to objection."

§ 176. In *Rickard v. Moore*,¹ decided in the same year, the plaintiff verbally sold by sample to the defendant six bales of wool. The goods were sent off by the plaintiff, and delivered at a railway station, and were received there and taken home by the defendant, who then unpacked the wool, and wrote the same day to the plaintiff that two bales were inferior to sample, asking what was to be done in the matter. Plaintiff replied denying that the bales were not equal to sample. The defendant was away from home when this letter arrived. Four days afterwards he returned home, and after reading the plaintiff's letter sent the goods back to the railway station, and telegraphed to the plaintiff rejecting them. During these four days the defendant admitted that he had offered the goods for sale in the market, stating, however, that he had not accepted them, and that he would have to make other arrangements before he could sell. In an action for goods sold and delivered the defendant (*inter alia*) pleaded, first, that there was no acceptance or actual receipt to take the case out of the Statute of Frauds; and, secondly, that he had properly rejected the goods as not equal to sample. *The jury found at the trial that two of the bales* [*141] *were not equal to *sample*, and Hawkins J. thereupon directed a verdict, and gave judgment for the defendant. On appeal, Bramwell L. J. held both points in the defendant's favor, distinguishing *Kibble v. Gough* upon the question of acceptance within the Statute of Frauds, upon the ground that in that case the jury had found that there was in fact an acceptance of the goods by the defendant, and that there was evidence to justify that finding. In this judgment Baggallay L. J. concurred. Thesiger L. J., while not differing from the judgment of Bramwell L. J., preferred to rest his judgment upon the second point taken, viz., that whether or not there was an acceptance to satisfy the statute, the defendant had done nothing to waive his right to reject the goods as not equal to sample, and the jury had found as

¹ 38 L. T. N. S. 841, C. A.

a fact that the goods were not equal to sample. *Morton v. Tibbett*, though cited in the argument, is not directly referred to in the judgments, but it is quite clear from what was said by Bramwell and Thesiger L. JJ. that both recognized and adopted the distinction between an acceptance such as would satisfy the Statute of Frauds, *in other words a conditional acceptance*, and an acceptance of the goods as equal to sample.]

§ 177. The case of *Smith v. Hudson*,¹ already referred to, *ante*, p. 138, is worthy of note, also, on another ground. It clearly recognizes and maintains the long-established doctrine that the acceptance and actual receipt are distinct things, both of which are essential to the validity of the contract. This would seem sufficiently clear from the language of the statute, but on more than one occasion remarks had been made by eminent judges, suggesting doubt upon the question. Thus, in *Castle v. Swarder*,² Crompton J. said, "I have sometimes doubted whether there is much distinction between receipt and acceptance;" and Cockburn C. J. said, "I think those terms (*i.e.*, acceptance and receipt) are equivalent." In *Marvin v. Wallace*,³ also, Erle J. said, according to one report, "I believe that the party who inserted the words had no idea what he meant by acceptance."⁴ That opinion I found on the everlasting discussion which has gone *on, as if possession according to law could mean [*142] only manual prehension." It is probable, however, both from the context and from the point in dispute, that his lordship is more correctly represented in another report, as saying, "I believe that the persons who framed the statute, and inserted the words 'actually received the same,' had no clear idea of their meaning," &c. It may confidently be assumed, however, that the construction which attributes distinct meanings to the two expressions, "acceptance" and "actual receipt," is now too firmly settled to be treated as an open question, and this is plainly to be inferred from the opinions delivered in *Smith v. Hudson*.⁵

¹ 5 B. & S. 481; 34 L. J. Q. B. 145.

⁴ *Pinkham v. Mattox*, 53 N. H. 605,

² 6 H. & N. 832; 30 L. J. Ex. 310. 606.

³ 6 E. & B. 726; 25 L. J. Q. B. 369.

⁵ Referring to the remarks of

§ 178. Acceptance by the vendee may be prior to the actual receipt of the goods, as for instance, when he has inspected and approved the specific goods at or before the time of purchasing. Thus in *Cusack v. Robinson*,¹ where the buyer was shown a lot of 156 firkins of butter in the vendor's cellar, and had the opportunity of inspecting as many of them as he pleased, and did in fact open and inspect six of the firkins, and then agreed to buy them, and the goods were then forwarded to the purchaser by a carrier according to his directions; it was held that there was sufficient evidence to justify the jury in finding an acceptance, and that the acceptance before the bargain was concluded, was a compliance with the statute. This question was raised, but not decided, in *Saunders v. Topp*,² which is referred to by Blackburn J. in delivering the opinion of the Court in *Cusack v. Robinson*.

§ 179. In deciding *Cusack v. Robinson*, the Court distinguished it from *Nicholson v. Bower*,¹ because in the latter case there had been no specific goods selected and fixed on in advance. Bower had made a verbal sale of about 140 quarters of wheat, by sample, to be delivered by rail in London. The wheat was received at the London depot, and warehoused by the railway company, and the purchasers sent a carman to get a sample, and after inspecting it, told him not to cart the wheat home at present. The purchasers were really *in insolvent circumstances, and immediately after the interview with the carman determined to stop payment, and they therefore thought it would be dishonest to receive the wheat, although equal to sample, when they knew they could not pay for it. All the judges held, that there had been no acceptance in fact,

Crompton J. and Cockburn C. J. in this case, the New York Court of Appeals say, in *Cook v. Mellard*, 65 N. Y. 368, that "these remarks cannot be regarded as of any weight, being contrary to the decided current of authority." See *Stone v. Browning*, 68 N. Y. 598; *Cross v.*

O'Donnell, 44 N. Y. 661; s. c. 4 Am. Rep. 721.

¹ 1 B. & S. 299; § 30, L. J. Q. B. 261. See, also, *Heermance v. Taylor*, 14 Hun (N. Y.) 149.

² 4 Ex. 300.

¹ 1 E. & E. 172; 28 L. J. Q. B. 97.

and the assignees of the purchasers were not allowed to retain a verdict in their favor.

In *Saunders v. Topp*,² the defendant had selected forty-five couple of ewes and lambs at the plaintiff's farm, and ordered them to be sent to his own farm, where they were received by his agent.³ He then ordered them to be sent to another place, where he saw them and counted them over, and said, "it is all right." The Court declined to decide whether the previous selection was equivalent to an acceptance (a point subsequently decided in the affirmative in *Cusack v. Robinson*, *ut supra*), but held that the subsequent action of the defendant was sufficient to justify the jury in finding an acceptance after delivery.

§ 180. In one case,¹ Maule J. seems to have been strongly of opinion that it was sufficient to prove acceptance of part of the goods by the buyer, *after action brought*, but the Court declined to decide the point without further argument, and the case was settled. All the recent authorities are adverse to this *dictum*, which rested upon the assumption that the fact of acceptance was a mere question of evidence, whereas the statute makes it essential to the validity of the contract in a court of justice.² The report of the case shows that the judges had not the language of the statute before them. The point is also ruled adversely to this opinion of Maule J. in *Bill v. Bament*.³

² 4 Ex. 390.

³ See *Snow v. Warner*, 51 Mass. (10 Metc.) 132; s. c. 43 Am. Dec. 411.

¹ *Fricker v. Tomlinson*, 1 M. & G. 772.

² See *Knight v. Mann*, 118 Mass. 143; *Johnson v. Cuttle*, 105 Mass. 447; s. c. 7 Am. Rep. 545; *Denny v. Williams*, 87 Mass. (5 Allen) 1; *Davis v. Eastman*, 83 Mass. (1 Allen) 422; *Marsh v. Hyde*, 69 Mass. (3 Gray) 331. See, also, §§ 170, note 3, and 178, note 1.

³ 9 M. & W. 36. It is said in *Massachusetts*, in the case of *Townsend v. Hargraves*, 118 Mass. 325, 336, that "except that the statute provides

that no action shall be brought, there would be no good reason to hold that a memorandum signed, or an act of acceptance proved, at any time before the trial, would not be sufficient."

Acceptance need not be contemporaneous with the sale, but may be anterior or subsequent thereto. *Buckingham v. Osborne*, 44 Conn. 133, 139; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Bush v. Holmes*, 53 Me. 417; *Davis v. Moore*, 13 Me. 424; *Marsh v. Hyde*, 69 Mass. (3 Gray) 331; *Damon v. Osborn*, 18 Mass. (1 Pick.) 481; s. c. 11 Am. Dec. 229; *McCarthy v. Nash*, 14 Minn. 127, 131; *Matthiesen & W. R. Co. v. McMahon*, 38 N. J. L. (9 Vr.) 536, 538; *Field v. Runc*,

§ 181. It is settled that the receipt of goods by a carrier or wharfinger appointed by the purchaser does not constitute an acceptance, these agents having authority only to receive, not to accept the goods for their employers.¹

[*144] § 182. * Among the numerous cases in which the Courts have set aside verdicts on the ground that

22 N. J. L. (2 Zab.) 525, 530; Van Woert v. Albany & S. R. R. Co., 67 N. Y. 538; Amson v. Dreher, 35 Wis. 615, 618. See Rickey v. Tenbroeck, 62 Mo. 563, 569; McKnight v. Dunlop, 5 N. Y. 544; Sale v. Darragh, 2 Hilt. (N. Y.) 184; Sprague v. Blake, 20 Wend. (N. Y.) 63.

¹ Astey v. Emery, 4 M. & S. 262; Hanson v. Armitage, 5 B. & Ald. 557; Johnson v. Dodgson, 2 M. & W. 656; Norman v. Phillips, 14 M. & W. 276; Kunt v. Hecht, 8 Ex. 814; Acebal v. Levy, 10 Bing. 376; Meredith v. Meigh, 2 E. & B. 370, and 22 L. J. Q. B. 401, in which Hart v. Sattley, 3 Camp. 528, is overruled; Cusack v. Robinson, 1 B. & S. 299, and 30 L. J. Q. B. 261; Hart v. Bush, E. B. & E. 494, and 27 L. J. Q. B. 271; Smith v. Hudson, 6 B. & S. 431, and 34 L. J. Q. B. 145.

American authorities. — Denmead v. Glass, 30 Ga. 637; Lloyd v. Wright, 25 Ga. 212; Hausman v. Nye, 62 Ind. 485; Maxwell v. Brown, 39 Me. 98; Jones v. Mechanics' Bank, 29 Md. 287; Atherton v. Newhall, 123 Mass. 141; Johnson v. Cuttle, 105 Mass. 447, 449; s. c. 7 Am. Rep. 545; Quintard v. Bacon, 99 Mass. 185, 186; Boardman v. Spooner, 95 Mass. (13 Allen) 353; Frostburg Mining Co. v. New England Glass Co., 63 Mass. (9 Cush.) 115; Snow v. Warner, 51 Mass. (10 Metc.) 132; s. c. 43 Am. Dec. 417; Grimes v. Van Vechten, 20 Mich. 410; Shepherd v. Pressey, 32 N. H. 49, 55, 56; Allard v. Greasert, 61 N. Y. 1; Cross v. O'Donnell, 44 N. Y. 661; s. c. 4 Am. Rep. 721; Rodgers v. Phillips, 40 N. Y. 519; Spencer v. Hale, 30 Vt. 315; s. c. 73 Am. Dec. 309;

Nicholson v. Bower, 1 E. & E. 172; Tower v. Tudhope, 37 Up. Can. Q. B. 210.

Delivery to carrier. — Receipt. — An acceptance of the goods and a subsequent delivery to a designated carrier, in pursuance of the contract of sale and an acceptance by the carrier, is a receipt by the purchaser. Wilcox Silver Plate Co. v. Green, 72 N. Y. 17; Allard v. Greasert, 61 N. Y. 1; Cross v. O'Donnell, 44 N. Y. 661; s. c. 4 Am. Rep. 721; Hubbard v. O'Brien, 8 Hun (N. Y.) 244; Spencer v. Hale, 30 Vt. 314; s. c. 73 Am. Dec. 309. See Williams v. Jackman, 82 Mass. (16 Gray) 517; Russell v. Carrington, 42 N. Y. 119; s. c. 1 Am. Rep. 498; Terry v. Wheeler, 25 N. Y. 522; Andrews v. Durant, 11 N. Y. 35; s. c. 62 Am. Dec. 55; Brewer v. Salisbury, 9 Barb. (N. Y.) 512. In Cross v. O'Donnell, *supra*, the court say that "while there is not, upon this question, entire harmony in the view of the judges, and while the authorities cannot all be reconciled, the general drift of them is toward the conclusion I have reached." See Maxwell v. Brown, 39 Me. 98; s. c. 63 Am. Dec. 605; Glen v. Whitaker, 51 Barb. (N. Y.) 451; People v. Haynes, 14 Wend. (N. Y.) 546; s. c. 28 Am. Dec. 530; Outwater v. Dodge, 6 Wend. (N. Y.) 397; Spencer v. Hale, 30 Vt. 314; s. c. 73 Am. Dec. 309; Hanson v. Armitage, 5 Barn. & Ald. 557; Morton v. Tibbett, 15 Q. B. 428; s. c. 69 Eng. C. L. 427; Coats v. Chaplin, 3 Q. B. 483; s. c. 43 Eng. C. L. 831; Acebal v. Levy, 10 Bing. 376; s. c. 25 Eng. C. L. 170; 2 Pars. on Contr. 326.

the jury had found acceptance by the buyer without sufficient evidence, some may be found which are not readily reconcilable with the principle that a dealing with the article in a manner inconsistent with the continuance of the right of property in the vendor is a constructive acceptance.

*Curtis v. Pugh*¹ is an instance of this class. The action was debt, for goods sold and delivered. The purchaser had given a verbal order for three hogsheads of Scotch glue, to be of the description called "Cox's best." The plaintiff, the vendor, sent two hogsheads, all that he was able to deliver at the time, to a wharf in London. Defendant removed them to his own warehouse, and there unpacked the whole of the glue and put it into twenty bags. On examination, the defendant considered the glue inferior to the quality ordered, and so informed plaintiff's agent on the next day. The plaintiff's brother admitted, on inspection two days later, that part of the glue, but not an unusual proportion, was inferior, and offered to make an allowance, but refused to take it back because it had been unpacked and put into bags, which was not necessary for the purpose of examination, and because the glue, when once unpacked, could not be replaced in the same condition in the hogsheads. Lord Denman C. J. was of opinion that the defendant had not in fact intended to accept the glue, but told the jury that "if the defendant had done any act *altering the condition of the article*, that was an acceptance, and that the question for them was whether or not the act of putting the glue into the bags had altered its condition." The Lord Chief Justice then left it to the jury to say "whether the glue was 'Cox's best,' and whether the defendant *had dealt with it so as to make it his own*," or had done no more than was necessary to examine the quality. All these *ques- [*145] tions were decided in plaintiff's favor by the jury, but the Court, on motion, pursuant to leave reserved, directed a nonsuit, Lord Denman saying, "In what I stated I certainly carried the doctrine, as to acceptance, a step further than I ought." Patteson J. said, "My Lord Chief Justice

¹ 10 Q. B. 111.

went a step further in his ruling than the authorities warrant," and Coleridge and Wightman JJ. concurred.

This case appears to be identical in principle with *Parker v. Wallis* (5 E. & B. 21), and the two decisions to be irreconcilable. The jury having found the facts in favor of plaintiff, there was ample evidence of a dealing with the goods which was wrongful unless the buyer was owner, and the constructive acceptance was therefore complete, according to the more recent decisions.

§ 183. The cases are not entirely consistent on the point whether mere silence and delay of the purchaser in notifying refusal of goods forwarded by his order suffice to constitute constructive acceptance. The fair deduction from the authorities seems to be that this is a question of degree, that a long and unreasonable delay would afford stringent proof of acceptance, while a shorter time would merely constitute *some* evidence to be taken into consideration with the other circumstances of the case.¹

§ 184. In *Bushel v. Wheeler*,¹ in the Court of Queen's Bench, defendant ordered certain machinery to be sent to him at Hereford by the Hereford sloop. It was sent on the 23d of April, and an invoice for the goods at three months' credit was forwarded in a letter of advice to defendant on the 25th of April. The carrier placed the goods in a warehouse on his own wharf on their arrival at Hereford, and notice was given to defendant. No communication on the subject of the goods was made by defendant till the 7th of October, when they were rejected. The defendant proved, however, that after the arrival of the goods at the warehouse, he had seen them, and informed the warehouseman

¹ *Rejection of goods.*—Whether unreasonable delay in rejecting goods, or negligence in dealing with them so that they are lost or damaged, amounts to an acceptance, is a question for the jury. *Downs v. Marsh*, 29 Conn. 409, 414; *Borrowdale v. Bosworth*, 99 Mass. 378, 381; *Gaff v. Homeyer*, 59 Mo. 345; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 17;

Murray v. Toland, 3 Johns. Ch. (N. Y.) 575; *Corning v. Colt*, 5 Wend. (N. Y.) 256; *Spencer v. Hale*, 30 Vt. 314; s. c. 73 Am. Dec. 309; *Willis v. Jernegan*, 2 Atk. 252; *Bushell v. Wheeler*, 17 Q. B. 442; *Morton v. Tibbett*, 15 Q. B. 428; *Tower v. Tudhope*, 37 Up. Can. Q. B. 200.

¹ 15 Q. B. 442.

that he did not intend to take them. Erskine J. directed a verdict for defendant, with leave to move to enter a verdict for plaintiff. * The Court refused to enter [*146] a verdict for plaintiff, but held that there was evidence of acceptance to go to the jury, and ordered a new trial. Lord Denman said that the "lapse of time, connected with the other circumstances, might show an *acceptance*, and this was a question of fact for the jury." Williams J. said that there might be a constructive *receipt* as well as delivery : and "it being once established that there may be an *actual receipt* by acquiescence, wherever such a case is set up, it becomes a question for the jury."² Coleridge J. said that the goods were carried by vendee's orders within a reasonable time to a particular warehouse. "That comes to the same thing as if they had been ordered to be sent to the vendee's house, and sent accordingly. In such a case, the vendee would have had the right to look at the goods and return them if they did not correspond to order. But here the vendee took no notice of the arrival, and makes no communication to the party to whom alone a communication was necessary."

§ 185. In *Norman v. Phillips*,¹ in the Exchequer, the Court felt bound by *Bushel v. Wheeler*, but declined to apply it to the case before them. Defendant ordered from plaintiff certain yellow deals, with directions to send them to a specified station of the Great Western Railway, to be forwarded to him as on previous occasions. The order was given on the 17th of April, the deals arrived at the station on the 19th, on which day the defendant was informed of the arrival by the railway clerk, and said he would not take them. An invoice was sent on the 27th of April, which defendant received and kept, but it did not appear that he had ever seen the deals. On the 28th of May, defendant informed plaintiff that he declined to take the goods. Pollock C. B. refused to nonsuit, and directed the jury to find for plaintiff, with leave reserved to defendant to move for

² See *Borrowdale v. Bosworth*, 99 Mass. 381.

¹ 14 M. & W. 277.

nonsuit or verdict for him. All the judges concurred in making the rule absolute. Alderson B. remarked during the argument that it was difficult to distinguish the case from *Bushel v. Wheeler*, and it is perceptible, from [*147] the language of all the * judges, that they did not yield entire assent to that case. *Bushel v. Wheeler* was, however, mentioned as a "well-considered case" in *Morton v. Tibbett* (*ante*, p. 133): and in *Parker v. Wallis*,² Lord Campbell said *arguendo*, that "detention of the goods for a long and unreasonable time by the vendee is evidence that he has accepted them." In *Smith v. Hudson* (34 L. J. Q. B. 145), Blackburn J. refers to *Morton v. Tibbett* as establishing that lapse of time is *some* evidence of acceptance; and observations to a similar effect are to be found in the opinion delivered by Parke B. in *Cunliffe v. Harrison* (6 Ex. 906).

§ 186. In *Nichols v. Plume*,¹ a quantity of cider was sent to defendant, who had ordered it verbally, but he refused to receive it, and caused it to be lodged in a warehouse in the neighborhood not belonging to him. The cider was not returned to plaintiff, nor did defendant send him any notice of his intention not to use it. Best C. J. held that there had been no acceptance under the statute. The report does not show the length of the delay which elapsed, nor was the question raised whether there had been constructive acceptance by unreasonable delay.

§ 187. When goods are marked with the name of the purchaser, by his consent, this constitutes an acceptance of the goods, if all the terms of the contract have been agreed on, but not an actual receipt, and the sale cannot be allowed to be good, without further proof of delivery.

[*148] * § 188. The acceptance of part of the goods bought makes the contract good for the whole, even in cases where some of the goods are not yet in existence, but are to be manufactured.¹

² 5 E. & B. 21.

Baldey v. Parker, 2 B. & C. 37;

¹ 1 C. & P. 272.

Proctor v. Jones, 2 C. & P. 532;

¹ *Bill v. Bament*, 9 M. & W. 36; *Hodgson v. Le Bret*, 1 Camp. 233;

In *Scott v. The Eastern Counties Railway Company*,² the defendants ordered a number of lamps from the plaintiff, a manufacturer, of which one, a triangular lamp, was of a very peculiar construction, and was not ready for delivery until nearly two years after the order. In the meantime, and in the same month when the order was given, all the other lamps were delivered and paid for. The defendants rejected the triangular lamp, and it was objected on action brought that their acceptance of the other lamps two years earlier, and when the triangular lamp was not in existence, could not be considered a part acceptance of that lamp. The Court, however, held the contract entire for all the lamps, and that the acceptance and actual receipt of some of them made the contract good for all.³

§ 189. In *Elliott v. Thomas*,¹ there was a joint order for common steel and for cast steel. The common steel was accepted, but there was a dispute about the cast steel, and the question was, whether the acceptance of the former sufficed to make the whole contract valid, and it was so held. Parke B., in giving the decision, explained *Thompson v. Maceroni*,² in which the language of the opinion seemed adverse to the view taken by the Court by showing that this

Boulter v. Arnott, 1 C. & M. 334. See, also, *Dyer v. Libby*, 61 Me. 45; *Woodford v. Patterson*, 32 Barb. (N. Y.) 630; *Rappleye v. Adey*, 65 Barb. (N. Y.) 589; s. c. 1 N. Y. Supr. Ct. (1 T. & C.) 126; *Hodgson v. Le Bret*, 1 Campb. 235; *Saunders v. Topp*, 4 Ex. 390.

In *Swigart v. McGee*, 19 Ark. 473, it is held that where, on an entire contract for the sale and delivery of personal property, a part is delivered and paid for, the contract is taken out of the Statute of Frauds; but the Supreme Court of Michigan say in *Scotten v. Sutter*, 37 Mich. 526, that an acceptance of merchandise, under a contract that is invalid by the Statute of Frauds, cannot be implied, from a tender of such merchandise made on one side, without

referring to any contract and a refusal on the other, to take it for want of time to attend to it, with a promise, however, to send for it when it should be needed.

Sloan Saw Mill & Lumber Co. v. Gutshall, 3 Colo. 8; *Phelps v. Cutler*, 70 Mass. (4 Gray) 137; *Marsh v. Hyde*, 69 Mass. (3 Gray) 331, 334; *Gault v. Brown*, 48 N. H. 183; *Gilman v. Hill*, 36 N. H. 311, 321; *McKnight v. Dunlop*, 5 N. Y. 537; *O'Brien v. Credit Valley Ry. Co.*, 25 Up. Can. C. P. 275; *Robinson v. Gordon*, 23 Up. Can. Q. B. 143.

¹ 12 M. & W. 33.

² See *Ross v. Welch*, 77 Mass. (11 Gray) 235.

³ 3 M. & W. 176.

⁴ 3 B. & C. 1. See, also, *Digg v. Whiskin*, 14 C. B. 195.

last-named case turned entirely on the form of the action, which was for goods *sold and delivered*, an action clearly not maintainable for such part of the goods as had not been actually delivered to the buyer.³

§ 190. So where there was a verbal contract of sale by the terms of which the thing was to be resold to the vendor at a fixed price in a particular event, the acceptance by [*149] the *purchaser in the first instance takes the whole agreement, as an entire contract, out of the statute, and he cannot object, when afterwards sued on the stipulation for the resale, that this contract was not in writing, and that there had been no acceptance nor actual receipt.¹

§ 191. The effect of the acceptance and actual receipt of the goods, or part of them, is to prove that there was a contract of sale,¹ and this effect is produced, although there may be a dispute between the parties as to the terms of the con-

³ *Acceptance of part.—Rejection of part.*—A delivery and acceptance by the purchaser of any portion of the goods bargained for will satisfy the Statute of Frauds; but to authorize the maintenance of a suit for goods sold and delivered, there must be a delivery and acceptance of all the goods sued for. *Atwood v. Lucas*, 53 Me. 508. An acceptance of a part of the goods must be made with the intention to perform the whole contract, to be valid and binding upon the parties. *Atherton v. Newhall*, 123 Mass. 141; s. c. 25 Am. Rep. 47; *Remick v. Sandford*, 120 Mass. 309; *Townsend v. Hargraves*, 118 Mass. 325, 333; *Marsh v. Hyde*, 69 Mass. (3 Gray) 331; *Grover v. Cameron*, 6 Up. Can. Q. B. (O. S.) 198. See generally on this subject, *Dyer v. Libby*, 61 Me. 45; *Ross v. Welch*, 77 Mass. (11 Gray) 235. Generally in an action for goods sold and delivered, if the plaintiff prove a delivery at the time and place agreed, and that he has performed fully his part of the contract, it is not necessary for him to show acceptance by

the defendant. See *Dyer v. Libby*, 61 Me. 45; *Rodman v. Guilford*, 112 Mass. 405, 407; *Nichols v. Morse*, 100 Mass. 523; *Pacific Iron Works v. Long Island R. R. Co.*, 62 N. Y. 272.

¹ *Williams v. Burgess*, 10 Ad. & E. 499.

A condition annexed to the original contract by which it is annulled is not within the Statute of Frauds. *Dickinson v. Dickinson*, 29 Conn. 600; *Wooster v. Sage*, 67 N. Y. 67; *White v. Knapp*, 47 Barb. (N. Y.) 549-555.

An agreement to resell, however, is within the statute. *State v. Intoxicating Liquors*, 61 Me. 520; *Quincy v. Tilton*, 5 Me. 277; *Chapman v. Searle*, 20 Mass. (3 Pick.) 38; *Blanchard v. Trim*, 38 N. Y. 225; *Shindler v. Houston*, 1 N. Y. 261; s. c. 49 Am. Dec. 316; *Hagar v. King*, 28 Barb. (N. Y.) 300; *Bailey v. Ogdens*, 3 Johns. (N. Y.) 399; s. c. 3 Am. Dec. 501; *Page v. Clough* (N. Y. Supr. Ct.) 1 Alb. L. J. 162; *Miller v. Smith*, 1 Mason C. C. 437.

¹ *Vide* sec. 189, note 3.

tract.² Such dispute is to be determined on the parol evidence, as all other questions of fact are, by the jury. Where the goods have been accepted, litigation may arise on various questions, for instance, as to the price; whether the sale was for cash or on credit; whether notes or acceptances were to be given, &c. This point may not only be inferred from the decisions already referred to, especially that in *Morton v. Tibbett*, but was expressly decided in *Tomkinson v. Staight*.³

The defendant in that case was alleged to have bought a piano from the plaintiff, which was delivered to him at his house, and payment demanded. He said he would not pay, insisting that the agreement was that he should retain the piano as security for some bills of exchange bought from the plaintiffs. The defendant refused to let the plaintiff take back the piano, and kept it. *Held*, that the acceptance being fully proven, the statute was satisfied, and that the dispute about the terms of the contract thus proven to exist, was matter of fact for decision by the jury on the parol evidence which was properly let in at the trial.

§ 192. An acceptance by the purchaser can have no effect to satisfy the statute after the vendor has disaffirmed the parol contract. In *Taylor v. Wakefield*,¹ there was a verbal agreement between the owner of the goods and his tenant, who had possession of them, that the latter might purchase them at the expiration of his tenancy, but was not to take them *till the money was paid. At the term- [*150] nation of the tenancy, the buyer tendered the price, but the vendor refused it, and denied the validity of the bargain. The buyer then proceeded to take away the goods, but the vendor prevented him. *Trover* by the buyer against

² *Atwood v. Lucas*, 53 Me. 508; *Van Woert v. Albany & S. R. R. Co.*, 67 N. Y. 538; *McKnight v. Dunlop*, 5 N. Y. 537; s. c. 55 Am. Dec. 370; *Boutwell v. O'Keefe*, 32 Barb. (N. Y.) 434; *Schultz v. Bradley*, 4 Daly (N. Y.) 29; *Sale v. Darragh*, 2 Hilt. (N. Y.) 184; *Brock v. Knower*, 37 Hun (N. Y.) 609; *Thompson v. Menck*, 2 Keyes (N. Y.) 86; *Brad-*

ley v. Wheeler, 4 Robt. (N. Y.) 18; *Mills v. Hunt*, 20 Wend. (N. Y.) 431; *Sprague v. Blake*, 20 Wend. (N. Y.) 61; *Danforth v. Walker*, 40 Vt. 257; *Garfield v. Paris*, 96 U. S. (6 Otto) 557, 566; bk. 24, L. ed. 821; *McMaster v. Gordon*, 20 Up. Can. C. P. 16.

³ 25 L. J. C. P. 85, and 17 C. B. 697.

¹ 6 E. & B. 765.

the vendor. *Held*, no evidence for the jury of acceptance and delivery, because the vendor had disaffirmed the contract before the buyer took to the goods.

Section II.—WHAT IS AN ACTUAL RECEIPT.

§ 193. This question is not free from difficulty, nor have the cases always been consistent. The circumstances in which the goods happen to be at the time of the contract afford the basis of a convenient arrangement for reviewing the authorities. The goods sold may be in possession —

1. Of the buyer as bailee or agent of the vendor;
2. Of a third person, whether or not bailee or agent of the vendor;
3. Of the vendor himself, and this is the most usual case.

§ 194. 1. When the goods at the time of the contract are already in possession of the purchaser, it may be difficult to prove actual receipt. But wherever it can be shown that the purchaser has done acts inconsistent with the supposition that his former possession has remained unchanged, these acts may be proven by parol, and it is a question of fact for the jury whether the acts were done because the purchaser had taken to the goods as owner.¹ The principle is illustrated in the case of *Edan v. Dudfield*.²

In that case the defendant, agent of plaintiff, had in his possession goods which he had entered at the Custom House in his own name, but which belonged to the plaintiff. He agreed to buy them at a discount on the invoice cost, and afterwards sold them. On action for the price it was strenuously maintained by Sir Fitzroy Kelly, that where [*151] the *goods exceeding 10*l.* in value, were already in possession of the alleged buyer, there could be no valid sale under the Statute of Frauds, without a writing; because, although there might be a *virtual*, there could not possibly be an *actual* receipt. But the Court, after time

¹ See, *Beaumont v. Crane*, 14 Mass. 400; *Brown v. Warren*, 43 N. H. 430; *Couillard v. Johnson*, 24 Wis. 533.

² 1 Q. B. 306. See *Markham v. Jaudon*, 41 N. Y. 235, 242.

to consider, held, that there was evidence to justify the jury in finding an actual receipt, saying, "We have no doubt that one person in possession of another's goods may become the purchaser of them by parol, and may do subsequent acts, without any writing between the parties, which amount to acceptance (receipt?) And the effect of such acts, necessarily to be proven by parol evidence, must be submitted to a jury."

In *Lillywhite v. Devereux*,³ the Exchequer Court observed, "No doubt can be entertained after the case of *Edan v. Dudgefield*, which was well decided by the Court of Queen's Bench, that this is a question of fact for the jury: and that, if it appears that the conduct of a defendant in dealing with goods already in his possession, is wholly inconsistent with the supposition that his former possession continues unchanged, he may properly be said to have accepted and actually received such goods under a contract, so as to take the case out of the operation of the Statute of Frauds: as, for instance, if he sells or attempts to sell goods, or if he disposes absolutely of the whole or any part of them, or attempts to do so, or alter the nature of the property, or the like." In this case, however, the Court disagreed with the jury, and set aside their verdict, as not justified by the evidence.

§ 195. 2. When the goods, at the time of the sale, are in possession of a third person, an actual receipt takes place when the vendor, the purchaser, and the third person agree together that the latter shall cease to hold the goods for the vendor and shall hold them for the purchaser. They were in possession of an agent for the vendor, and therefore, in contemplation of law, in possession of the vendor himself, and they became in possession of an agent for the purchaser, and therefore in that of the purchaser himself.¹

* But it is important to remark that all of the parties must join in this agreement, for the agent of the vendor cannot be converted into an agent for the vendee without his own knowledge and consent. Therefore, if the seller have goods in possession of a warehouseman, a wharf-

³ 15 M. & W. 285.

¹ Blackburn on Sale, 28.

inger, carrier, or any other bailee, his order given to the buyer directing the bailee to deliver the goods or to hold them subject to the control of the buyer, will not effect such a change of possession as amounts to actual receipt, unless the bailee accepts the order or recognizes it, or consents to act in accordance with it; and until he has so agreed, he remains agent and bailee of the vendor.²

² See *Boardman v. Spooner*, 95 Mass. (13 Allen) 353, 357; *Burge v. Cone*, 88 Mass. (6 Allen) 412; *Bullard v. Wait*, 82 Mass. (16 Gray) 55; *Rourke v. Bullens*, 74 Mass. (8 Gray) 549; *Appleton v. Bancroft*, 51 Mass. (10 Metc.) 231, 236; *Carter v. Willard*, 36 Mass. (19 Pick.) 1; *Tuxworth v. Moore*, 26 Mass. (9 Pick.) 347; s. c. 20 Am. Dec. 479; *Chapman v. Searle*, 20 Mass. (3 Pick.) 38; *Linton v. Butz*, 7 Pa. St. 89; s. c. 47 Am. Dec. 501; *Deady v. Goodenough*, 5 Up. Can. C. P. 163.

Acceptance by bailee.—Where property is in the hands of a bailee at the time of its sale, and an order is given for delivery to the purchaser after notice to or acceptance by such bailee, this will constitute a valid delivery under the Statute of Frauds. *Chase v. Willard*, 57 Me. 157; *Warren v. Milliken*, 57 Me. 97; *Townsend v. Hargraves*, 118 Mass. 325, 332; *Cushing v. Breed*, 96 Mass. (14 Allen) 370; *Boardman v. Spooner*, 95 Mass. (13 Allen) 353; *Burge v. Cone*, 88 Mass. (6 Allen) 412; *Hatch v. Lincoln*, 66 Mass. (12 Cush.) 31; *Hatch v. Bayley*, 66 Mass. (12 Cush.) 27; *Carter v. Willard*, 36 Mass. (19 Pick.) 1; *Tuxworth v. Moore*, 26 Mass. (9 Pick.) 348; s. c. 20 Am. Dec. 479; *Lane v. Sleeper*, 18 N. H. 214; *Hollingsworth v. Napier*, 3 Cal. (N. Y.) 186; s. c. 3 Am. Dec. 479; *Wilkes v. Ferris*, 5 Johns. (N. Y.) 335; s. c. 4 Am. Dec. 664; *Grove v. Brien*, 49 U. S. (8 How.) 429; bk. 12, L. ed. 1142; *Gibson v. Stevens*, 49 U. S. (8 How.) 384; s. c. bk. 12, L. ed. 1123; *In re Clifford*, 2 Sawy. C.

C. 428; *Evans v. Nichol*, 3 Man. & G. 614; *Bryans v. Nix*, 4 Mees. & W. 775; *Browne on Statute of Frauds*, § 318.

But it is said in *Boardman v. Spooner*, 95 Mass. (13 Allen) 353, that the acceptance in Massachusetts of a bill of goods which are in a warehouse in New York, with an order on the warehouseman after their delivery without notice to him, is not an acceptance or receipt of the goods which will take the sale out of the operation of the Statute of Frauds. And there are some well considered English cases which hold that to constitute an acceptance and receipt under the Statute of Frauds, there must also be an assent, on the party in whose custody the goods are to hold them for the vendee. See *Bentall v. Burn*, 3 Barn. & Cress. 423; *Farina v. Home*, 16 Mees. & W. 119. On the other hand there are cases which hold that a bill of lading is a symbol of the ownership of the goods covered by it, and that its transmission is such a transfer of the possession of the property described in it, as to meet the requirements of the Statute of Frauds. *Walsh v. Blakely*, 6 Mont. Ter. 194.

Where the vendor gives an order on the agent to deliver the property to the vendee and the agent accepts the order and agrees with the vendee to store the property for him, all the cases agree that the delivery is complete. See *King v. Jarman*, 35 Ark. 190; s. c. 37 Am. Rep. 11; *Phillips v. Ocmulgee Mills*, 55 Ga. 633, 637; *Hoffman v. Culver*, 7 Ill.

§ 196. In *Bentall v. Burn*,¹ the King's Bench held that a delivery order given to the purchaser of wine did not amount to an actual acceptance (receipt?) by him until the warehousemen accepted the order for delivery, "and thereby assented to hold the wine as agents of the vendee." A distinction was suggested in the case, because the warehousemen were the Dock Company, bound by law to transfer goods from buyer to seller, when required to do so, but the Court said: "This may be true, and they might render themselves liable to an action for refusing to do so; but if they did wrongfully refuse to transfer the goods to the vendee, it is clear that there could not then be any actual acceptance (receipt?) of them by him until he actually took possession of them."

§ 197. In *Farina v. Home*,¹ the foregoing case was followed by the Exchequer of Pleas. There the wharfinger gave the vendor a delivery warrant making the goods deliverable to him or to his assignee by endorsement on payment of rent and charges. The vendor forthwith endorsed and sent it to the purchaser, who kept it ten months, and refused to pay for the goods or to return the warrant, saying he had sent it to his solicitor and intended to defend the suit, as

App. 450, 458; *Robinson v. Safford*, 57 Me. 163; *Warren v. Milliken*, 57 Me. 97; *Townsend v. Hargraves*, 118 Mass. 325, 332; *Cushing v. Breed*, 96 Mass. (14 Allen) 376, 380; *Hunter v. Wright*, 94 Mass. (12 Allen) 548; *Legg v. Willard*, 34 Mass. (17 Pick.) 140; s. c. 28 Am. Dec. 282; *Tuxworth v. Moore*, 26 Mass. (9 Pick.) 347; s. c. 20 Am. Dec. 479; *Williams v. Evans*, 39 Mo. 201, 205; *Boswell v. Green*, 25 N. J. L. (1 Dutch.) 390, 399.

However, it seems that the case is different where the original vendor agrees to deliver the property to a person buying from the original vendee. *Marsh v. Rouse*, 44 N. Y. 643. And a distinction is made in some cases between an acceptance by the bailee of the seller and acceptance by his employee, for possession of the

latter is always the possession of his employer. *Fletcher v. Ingram*, 46 Wis. 101.

Acceptance where delivery is impossible.—Where an actual delivery is legally impossible, there can be constructive or symbolical delivery of goods. *Zachrisson v. Poppe*, 3 Bosw. (N. Y.) 171, 180; *Dunham v. Pettee*, 1 Daly (N. Y.) 112; s. c. *Gillespie v. Durand*, 3 E. D. Smith (N. Y.) 531, 538; *Smith* (N. Y.) 500, 505, 4 E. D.

¹ 3 B. & C. 423. See, also, *Lackington v. Atherton*, 7 M. & G. 360; *Bill v. Bament*, 9 M. & W. 36; *Lucas v. Dorrien*, 7 Taunt. 278; *Woodley v. Coventry*, 2 H. & C. 164, 32 L. J. Ex. 185; *Harman v. Anderson*, 2 Camp. 243.

¹ 16 M. & W. 119.

[*153] *he had never ordered the goods, adding that they would remain for the present in bond. *Held*, to be no actual receipt, but sufficient evidence of acceptance to go to the jury.

§ 198. In *Godts v. Rose*,¹ the vendor had the goods transferred by his warehouseman, on the books of the latter, to the buyer's order, and took the certificate of transfer, which he sent by his clerk to the buyer with an invoice for the goods. The clerk handed the invoice and warehouseman's certificate together to the buyer and asked for a cheque for the amount of the invoice, which was refused, the buyer alleging that he was entitled to fourteen days' credit. The clerk then asked for the warehouse certificate back again, but the buyer refused to give it up, and the vendor thereupon countermanded the order on the warehouseman: but the purchaser had already got part of the goods, and the warehouseman thinking that the property had passed, delivered the remainder to the purchaser. The vendor then brought trover against the purchaser, and the Court *held* that the delivery to the purchaser of the warehouseman's certificate was conditional only, and dependent upon his giving a cheque; that the actual receipt therefore had not taken place, the tripartite contract not being complete.

§ 199. But the goods may be lying on the premises of third persons, who are not bailees of them, as timber cut down and lying, at the disposal of the vendor, on the land of the person from whom he bought it, or lying, at his disposal, at a free wharf: and in such cases the delivery may be effected by the vendor's putting the goods at the disposal of the vendee and suffering the latter to take actual control of them as in the cases of *Transley v. Turner*,¹ and *Cooper v. Bill*,² *post*, Book II. Ch. 3.³

¹ 17 C. B. 229, and 25 L. J. C. P. 61.

² 2 Bing. N. C. 151.

³ 24 L. J. Ex. 161; 3 H. & C. 722.

³ *Where actual manual delivery is inconvenient, impracticable, or impossible, because of the weight or size*

thereof, the law will not require it, and if the goods sold be placed in the power of the purchaser, or his authority as owner is acknowledged by some formal act or declaration of the seller, it will amount to a sufficient delivery and acceptance (Thompson v. Baldi-

§ 200. [In *Marshall v. Green*,¹ where the buyer of timber growing on land *in the possession of the seller's tenant* cut down some of the trees, and agreed to sell the tops and *stumps to a third person, and the seller afterwards countermanded the sale, before any of the trees had been removed from the land, it was held that there was evidence of actual receipt, as well as of acceptance of a part of the goods within the meaning of the 17th section.

From the judgments of Coleridge C. J. and Brett J. it would appear that they relied solely upon the early Nisi Prius decisions of *Hodgson v. Le Bret* and *Anderson v. Scott* as to marking and acts of ownership which, as we have seen (*ante*, p. 147, note 0), have been practically overruled by the later authorities of *Bill v. Bament* and *Baldy v. Parker*; and *Grove J.*, at p. 44 of the report, alone, alludes to the true ground upon which it is submitted the decision must rest, viz., that the land was throughout in the possession not of the vendor, but of his tenant.]

more & O. R. R. Co., 28 Md. 396; *Hall v. Richardson*, 16 Md. 396; s. c. 77 Am. Dec. 303; *Atwell v. Miller*, 6 Md. 10; s. c. 61 Am. Dec. 294; *Van Brunt v. Pike*, 4 Gill. (Md.) 270; s. c. 45 Am. Dec. 126; *Arnold v. Delano*, 58 Mass. (4 Cush.) 33; s. c. 1 Am. Dec. 754; *Jewett v. Warren*, 12 Mass. 300; s. c. 7 Am. Dec. 74; *Brewster v. Leith*, 1 Minn. 56; *Bass v. Walsh*, 39 Mo. 192, 199; *Glasgow v. Nicholson*, 25 Mo. 29; *Hallenbeck v. Cochran*, 20 Hun (N. Y.) 416; *Yale v. Seely*, 15 Vt. 221; *Cotterill v. Stevens*, 10 Wis. 422; *Leonard v. Davis*, 66 U. S. (1 Black) 476, 482; bk. 17, L. ed. 222; *McNeil v. Keleher*, 15 Up. Can. C. P. 470), such as pig iron lying in piles at a furnace pointed out to the agent of the vendee and charged to the vendee on the books of the vendor (*Thompson v. Baltimore & O. R. R. Co.*, 28 Md. 396); stacks of hay pointed out and accepted by the vendee, who made a part payment of the purchase price

(*Hallenbeck v. Cochran*, 20 Hun (N. Y.) 416); trees cut and left upon the land of the vendor (*Yale v. Seely*, 15 Vt. 221); logs lying loose in a stream (*Cotterill v. Stevens*, 10 Wis. 422); or in a boom (*Brewster v. Leith*, 1 Minn. 56; *Leonard v. Davis*, 66 U. S. (1 Black) 476, 482; bk. 17, L. ed. 222).

While logs are floating in the water they are only in the constructive possession of the owner; and under such circumstances a symbolical delivery is all that can in general be accepted, and is amply sufficient to pass the title. *Leonard v. Davis*, 66 U. S. (1 Black) 476, 482; bk. 17, L. ed. 222. See, also, *Boyn-ton v. Veazie*, 24 Me. 288; *Ludwig v. Fuller*, 17 Me. 166; *Macomber v. Parker*, 30 Mass. (18 Pick.) 175; *Hutchins v. Gilchrist*, 23 Vt. 88; *Gibson v. Stevens*, 49 U. S. (8 How.) 384; bk. 12, L. ed. 1128; 2 Kent Com. 492.

¹ 1 C. P. D. 35.

§ 201. In America the language of the decisions is, that in such cases there must be "acts of such a character as to place the property unequivocally within the power and under the exclusive dominion of the buyer, as absolute owner, discharged of all lien for the price," in order to take the contract out of the operation of the statute. *Marsh v. Rouse*, 44 N. Y. Rep. 643.¹

§ 202. 3. Usually at the time of the sale the goods are in possession of the vendor himself, and the dealings of men are so infinitely diversified, circumstances vary so much, and the acts of parties so frequently admit of more than one construction, that it is extremely difficult to point out *à priori* at what precise period the goods sold can properly be said in all cases to have been actually received by the vendee. Of course, if the purchaser remove the goods from the vendor's possession and take them into his own, there is an actual receipt. And it is necessary here to renew the observation that the inquiry is now confined to the *validity* not the *performance* of the contract, and that the actual removal by the buyer of a part, however small, of the things sold, if taken as part of the bulk and by virtue of his purchase,¹ is an actual receipt sufficient to make the contract good, [*155] although a serious *question may and often does arise at a later period, whether there has been an actual receipt of the bulk.

§ 203. It is well settled that the delivery of goods to a common carrier, *à fortiori* to one specially designated by the purchaser, for conveyance to him or to a place designated by him, constitutes an actual receipt by the purchaser. In such

¹ In *Grey v. Cary*, 9 Daly (N. Y.) 363, under an oral agreement for the purchase of a scale, by the defendant from the plaintiff, to be paid for on delivery, it was taken for the purpose of delivery to the office of the defendant upon a truck driven by plaintiff's carman. He entered the defendant's office and handing the plaintiff's bill said he had the scale on his truck. He was told to drive

it into the back yard, and in attempting to do so, accidentally caused the scale to be broken. The court held that there had been no receipt of the scale by the purchaser sufficient to take the sale out of the Statute of Frauds. See *Hungate v. Rankin*, 20 Ill. 639; *Barr v. Logan*, 5 Har. (Del.) 52; 2 Kent Com. 491.

¹ *Klinitz v. Surry*, 5 Esp. 266.

cases the carrier is, in contemplation of law, the bailee of the person to whom, not *by* whom, the goods are sent, the latter in employing the carrier being considered as an agent of the former for that purpose.¹

It must not be forgotten that the carrier only represents the purchaser for the purpose of *receiving* not *accepting*, the goods.²

The law in the United States is the same. *Cross v. O'Donnell*, 44 N. Y. Rep. 661; *Caulkins v. Hellmann*, 47 N. Y. 449.³

§ 204. It is also now finally determined, that the goods may remain in the possession of the vendor, *if he assume a changed character*, and yet be actually received by the vendee. It may be agreed that the vendor shall cease to hold as owner, and shall assume the character of bailee or agent of the purchaser, thus converting the possession of the vendor into that of the vendee through his agent.¹

¹ *Dawes v. Peck*, 8 T. R. 330; *Waite v. Baker*, 2 Ex. 1; *Fragano v. Long*, 4 B. & C. 219; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Johnson v. Dodgson*, 2 M. & W. 653; *Norman v. Phillips*, 14 M. & W. 277; *Meredith v. Meigh*, 2 E. & B. 364, and 22 L. J. Q. B. 401; *Cusack v. Robinson*, 1 B. & S. 299, and 30 L. J. Q. B. 261; *Hart v. Bush*, E. B. & E. 494, and 27 L. J. Q. B. 271; *Smith v. Hudson*, 34 L. J. Q. B. 145; 4 B. & S. 431.

² *Supra*, p. 143.

³ *Delivery to a carrier designated by the purchaser* is equivalent to a delivery to the purchaser himself. *Magruder v. Gage*, 33 Md. 344; s. c. 3 Am. Rep. 177; *Hall v. Richardson*, 16 Md. 396; s. c. 77 Am. Dec. 303; *Foster v. Rockwell*, 104 Mass. 167, 172; *Hunter v. Wright*, 94 Mass. (12 Allen) 548, 550; *Merchant v. Chapman*, 86 Mass. (4 Allen) 362; *Orcutt v. Nelson*, 67 Mass. (1 Gray) 636; *Wilcox Silver Plate Co. v. Green*, 72 N. Y. 16; *Allard v. Greasert*, 61 N. Y. 1; *Everett v. Parks*, 62 Barb. (N. Y.) 9; *Strong v. Dodds*, 47 Vt. 348, 356; *Spencer v. Hale*, 30 Vt.

314; s. c. 73 Am. Dec. 309; *Cobb v. Arundell*, 26 Wis. 553. It is not necessary that the purchaser should employ the carrier personally. *Hunter v. Wright*, 94 Mass. (12 Allen) 548, 550.

¹ *Vendor as bailee of purchaser.*—It is well settled that the vendor may himself become the warehouseman or bailee of the purchaser. *Boynton v. Veazie*, 24 Me. 286; *Arnold v. Delano*, 58 Mass. (4 Cush.) 40; *Rapley v. Adey*, 65 Barb. (N. Y.) 589; *Green v. Merriam*, 28 Vt. 801; *Janvrin v. Maxwell*, 23 Wis. 51; *Ex parte Safford*, 2 Low. C. C. 563; *Cusack v. Robinson*, 1 Best & S. 299; *Beaumont v. Brengeri*, 5 C. B. 301; s. c. 57 Eng. C. L. 301; *Marvin v. Wallis*, 6 El. & Bl. 726; s. c. 88 Eng. C. L. 726; *Castle v. Swarder*, 6 Hurl. & N. 828; *Elmore v. Stone*, 1 Taunt. 458. Where personal property is, from its character or situation, at the time of the sale, incapable of actual delivery, the delivery of the bill of sale or other evidence of title is sufficient to transfer the property and possession to the vendee; thus, where

The first case was that of *Chaplin v. Rogers*,² in 1800, where a stack of hay remaining on the vendor's premises

articles of commerce were purchased in the state of Indiana, and the vendors, in whose warehouse they were lying, gave a written memorandum of the sale, together with a receipt of the money, and an engagement to deliver them on board of canal boats soon after the canal navigation, opened, these documents transferred the property and the possession of the articles to the purchasers, and being indorsed and delivered to a merchant in New York, in consideration of advances of money in the usual course of trade, transferred to him the legal title and constructive possession of the property. *Gibson v. Stevens*, 49 U. S. (8 How.) 384; bk. 12, L. ed. 1123. See *Beecher v. Mayall*, 82 Mass. (16 Gray) 376; *Barrett v. Goddard*, 3 Mason C. C. 107. The court say in *Gibson v. Stevens*, *supra*, that "this mode of transfer and delivery has been sanctioned in analogous cases by courts and justices in England and this country, and is absolutely necessary for the purpose of commerce. A ship at sea may be transferred to a purchaser by the delivery of a bill of sale; so also as to the cargo, by the indorsement and delivery of the bill of lading. It is hardly necessary to refer to adjudged cases to prove a doctrine so familiar in the courts. But the subject came before this court in the case of *Conard v. Atlantic Ins. Co.*, 26 U. S. (1 Pet.) 445; bk. 7, L. ed. 214, where this symbolical delivery was fully considered and sustained. The same principle was decided in the case of *Brown v. Heathcote*, 1 Atk. 160; *Greaves v. Hepke*, 2 Barn. & Ald. 131; *Atkinson v. Maling*, 2 T. R. 465; *Wilkes v. Ferris*, 5 Johns. (N. Y.) 335; s. c. 4 Am. Dec. 364; *Pleasants v. Pendleton*, 6 Rand (Va.) 473; s. c. 18 Am. Dec. 726; *Ingraham v. Wheeler*, 6 Conn. 277; *Ricker v.*

Cross, 5 N. H. 571; s. c. 22 Am. Dec. 480; *Gardner v. Howland*, 19 Mass. (2 Pick.) 599; 2 Kent Com. 499; *Story on Sales*, 311. This rule is not confined to the usage of any particular commerce, but applies to every case where the thing sold is, from its character or its situation at the time, incapable of actual delivery."

However there can be no sufficient receipt by the vendee so long as the vendor holds as vendor, and insists on his lien for the price. *Rodgers v. Jones*, 129 Mass. 420; *Atherton v. Newhall*, 123 Mass. 141; s. c. 25 Am. Rep. 47; *Safford v. McDonough*, 120 Mass. 290; *Shindler v. Houston*, 1 N. Y. 265; s. c. 49 Am. Dec. 316; *Rappleye v. Adees*, 65 Barb. (N. Y.) 589; *Wylie v. Kelly*, 41 Barb. (N. Y.) 594, 598; *Ex parte Safford*, 2 Low. C. C. 563; *Baldehy v. Parker*, 2 Barn. & Cress. 37. To constitute a valid sale under the statute there must be a delivery by the seller and some unequivocal acts of ownership on the part of the purchaser. *Godchaux v. Mulford*, 26 Cal. 316; *Means v. Williamson*, 37 Me. 556; *Waldron v. Chase*, 37 Me. 414; s. c. 59 Am. Dec. 56; *Safford v. McDonough*, 120 Mass. 290; *Knight v. Mann*, 118 Mass. 143; *Ross v. Welch*, 77 Mass. (11 Gray) 235; *Ullman v. Barnard*, 73 Mass. (7 Gray) 554; *Marsh v. Hyde*, 69 Mass. (3 Gray) 331; *Snow v. Warner*, 51 Mass. (10 Metc.) 132; s. c. 43 Am. Dec. 417; *Chaplin v. Rogers*, 1 East, 192; *Currie v. Anderson*, 2 El. & El. 592; *Morton v. Tibbitt*, 15 Q. B. 428; *Blenkinsop v. Clayton*, 7 Taunt. 597; s. c. 1 J. B. Moore, 328.

Where the property is so situated that the vendee is entitled to and can rightfully take possession of it at his pleasure, he is considered as having actually received it as the statute requires, although it may be his re-

was held to have been actually received by the purchaser, on the ground that he had resold part of it to a sub-vendee, who had taken away the part so purchased by him.

§ 205. But the case usually cited as the leading one on this point is *Elmore v. Stone*,¹ where the purchaser of horses from a dealer left them with the dealer to be kept at livery for him, * the purchaser. Sir James Mans- [*156]field delivered the judgment of the Common Bench, holding that as soon as the dealer had consented to keep them at livery his possession was changed, and from that time he held not as owner, but as any other livery-stable keeper might have done.²

quest to have it continued in the custody of the vendor. *Houdlette v. Tallman*, 14 Me. 400; *Riddle v. Varnum*, 37 Mass. (20 Pick.) 280; *Chapman v. Searle*, 20 Mass. (3 Pick.) 38; *Means v. Williams*, 37 Minn. 556; *Bartlett v. Goddard*, 3 Mason C. C. 107.

What constitutes vendor bailee. — It has been said that where the vendor says to the vendee, "I deliver the goods," and the latter replies, "I accept them, and desire you to store them for me as my bailee," that this is a good contract and constitutes the vendor bailee of the vendee. *Janvrin v. Maxwell*, 23 Wis. 51. But the weight of authority seems to hold that something more is required than mere words. See *Malone v. Plato*, 22 Cal. 103; *Bowers v. Anderson*, 49 Ga. 143; *Kirby v. Johnson*, 22 Mo. 354; *Shindler v. Houston*, 1 N. Y. 261, 265; s. c. 49 Am. Dec. 316; *Stone v. Browning*, 13 Abb. (N. Y.) Pr. N. S. 190; *Brand v. Brand*, 49 Barb. (N. Y.) 348; *Ely v. Ormsby*, 12 Barb. (N. Y.) 570; *Hallenbeck v. Cochran*, 20 Hun (N. Y.) 416; *Ham v. Van Ordam*, 4 Hun (N. Y.) 710; *Brand v. Focht*, 3 Keyes (N. Y.) 409; s. c. 1 Abb. Ct. App. Dec. 185, 187; *Cook v. Millard*, 5 Lans. (N. Y.) 243, 249; s. c. 65 N. Y. 352, 374; *Carter v. Toussaint*, 5 Barn. & Ald.

855; *Tempest v. Fitzgerald*, 3 Barn. & Ald. 580. See, also, *Owens v. Lewis*, 46 Ind. 488; s. c. 15 Am. Rep. 295; *Wiley v. Kelly*, 41 Barb. (N. Y.) 594; *Wedford v. Patterson*, 32 Barb. (N. Y.) 630; *Matthiessen & W. R. Co. v. McMahon*, 38 N. J. L. (9 Vr.) 536, 538.

¹ 1 East, 195, referred to with approval by Coleridge C. J. in *Marshall v. Green*, 1 C. P. D. at p. 41.

² 1 Taunt. 458. See, also, *Rapleye v. Ades*, 65 Barb. (N. Y.) 589; s. c. 1 N. Y. Sup. Ct. 126.

³ In *Ex parte Safford*, 2 Low. C. C. 563, in speaking of *Elmore v. Stone*, 1 Taunt. 458, cited in the text, Lowell J. says: "I have seen it stated that this case has been overruled, but that is a mistake; it was fully proved by Shaw C. J., who states the exact case, though he does not cite it by name, in *Arnold v. Delano*, 58 Mass. (4 Cush.) 40; s. c. 50 Am. Dec. 754. It was cited and followed in *Beaumont v. Brengeri*, 5 C. B. 301; s. c. 57 Eng. C. L. 301, and *Marvin v. Wallis*, 6 El. & Bl. 726; s. c. 88 Eng. C. L. 726. And this doctrine prevails in *Cusack v. Robinson*, 1 Best & S. 299." But see *Malone v. Plato*, 22 Cal. 103; *Kirby v. Johnson*, 22 Mo. 354.

§ 206. Nearly half a century later, in 1856, the case of *Marvin v. Wallis*,¹ on facts almost identical with those in *Elmore v. Stone*, was decided by the Queen's Bench on the authority of the latter. The facts as found by the jury were that after the completion of the bargain, the vendor borrowed the horse for a short time, and, with the purchaser's assent, retained it as a borrowed horse. *Held*, that there had been an actual receipt by vendee; and there had been a *change of character* in the vendor, from owner to bailee and agent of the purchaser. The Bench on this occasion was composed of Campbell C. J. and Coleridge and Erle JJ.

So in *Beaumont v. Brengeri*,² the carriage bought by the defendant remained in the shop of the plaintiff the vendor, but the circumstances showed that this was at the request of the defendant, and that plaintiff had changed his character from owner to warehouseman of the carriage for account of the vendee. *Held*, an actual receipt.³

§ 207. Two cases decided in the King's Bench, in 1820 and 1821, may be seen at first sight to trench upon the doctrine established in *Elmore v. Stone* and *Martin v. Wallis*. In the first, *Tempest v. Fitzgerald*,¹ the purchaser of a horse agreed, in August, to give forty-five guineas for it and to take it away in September. *The parties understood it to be a ready-money bargain*. The purchaser returned on the 20th September, ordered the horse out of the stable, mounted and tried it, had it cleaned by his servant, ordered some change in the harness, and asked plaintiff's son to keep it for another week, which was assented to as a favor. The purchaser said he would call and pay for the horse about the 26th or 27th. He returned on the 27th with the inten-

¹ 6 E. & B. 726; 25 L. J. Q. B. 369.
American authorities. — See *Bul-
 lard v. Wait*, 82 Mass. (16 Gray) 55;
Appleton v. Bancroft, 51 Mass. (10
 Metc.) 231, 236; *Carter v. Willard*,
 36 Mass. (19 Pick.) 1; *Whipple v.*
Thayer, 33 Mass. (16 Pick.) 28; s. c.
 26 Am. Dec. 626; *Tuxworth v. Moore*,
 26 Mass. (9 Pick.) 347; s. c. 20 Am.
 Dec. 479; *Ely v. Ormsby*, 12 Barb.

(N. Y.) 570; *Olyphant v. Baker*, 5
 Den. (N. Y.) 379; *Vincent v. Ger-
 mond*, 11 Johns. (N. Y.) 283; *Green*
v. Merriam, 28 Vt. 801.

² 5 C. B. 301.

³ See for a full discussion of this
 subject and review of authorities,
Matthiessen & W. R. Co. v. McMahon,
 38 N. J. L. (9 Vr.) 536, 538.

¹ 3 B. & Ald. 680.

tion of taking it, but the horse had died in the *in- [*157] terval, and he refused to pay. *Held*, that there was no actual receipt. The ground of the decision was that defendant had no right of property in the horse *until the price was paid*; that if he had gone away with the horse vendor might have maintained trover: and the case was distinguished by the judges from *Chaplin v. Rogers*,² and *Blenkinsop v. Clayton*,³ on this basis. In the second case, *Carter v. Tous-saint*,⁴ the plaintiffs, who were farriers, sold defendant a racehorse which required firing, and this was done in defendant's presence and with his approbation. It was agreed that the horse should be kept by plaintiffs for twenty days without charge. At the end of that time, by defendant's orders, the horse was taken by plaintiffs to a park to be turned out to grass. It was entered in plaintiffs' name, and this was also done by the direction of the defendant, who was anxious that it should not be known that he kept a racehorse. *No time was specified in the bargain for the payment of the price.* *Held*, that there had been no actual receipt, because the seller was not bound to deliver the horse without payment of the price, and that he had never lost possession or control of the horse. If the horse had been put in the park-keeper's books in the name of defendant and by his request, that would have amounted to an actual receipt of it by the purchaser: but on the facts the purchaser could not have maintained trover against the park-keeper on tendering the keep.

It is apparent, from the reasoning of the judges in both cases, that there is nothing irreconcilable between the principles on which they were decided and those which had been sanctioned in the cases previously quoted. Both these cases went distinctly upon the ground that in a cash sale the vendor has a right to demand payment of the price concurrently with delivery of possession; and that as nothing had been assented to by the vendors which impaired this right, there has been no actual receipt by the vendees.⁵

² 1 East, 192.

³ 7 Taunt. 597.

⁴ 5 B. & Ald. 855.

⁵ See, also, *Holmes v. Hoskins*, 9 Ex. 753. See *Safford v. McDonough*, 120 Mass. 290.

[*158] *§ 208. In *Cusack v. Robinson*,¹ the Court treated the rule as settled that "though the goods remain in the personal possession of the vendor, yet if it is agreed between the vendor and vendee that the possession shall thenceforth be kept, not as vendor, but as bailee for the purchaser; the right of lien is gone, and then there is a sufficient receipt to satisfy the statute."

The subject was very thoroughly discussed in *Castle v. Swarder*,² in which an unanimous decision of the Exchequer of Pleas, composed of Martin, Channell, and Bramwell BB., was reversed by a decision, also unanimous, of the Exchequer Chamber, composed of Cockburn C. J. and Crompton J. of the Queen's Bench, and Willes, Biles, and Keating JJ. of the Common Pleas.

This was an action to recover 80*l.* 2*s.* 2*d.* the price of some rum and brandy, for which the defendant gave a verbal order at a price agreed on, *with six months' credit*. The plaintiffs' clerk wrote off, and transferred into the defendant's name, in the books in plaintiffs' bonded warehouse, two specific puncheons of rum and a hogshead of brandy, marked, and described in an invoice sent by post to defendant. These packages the plaintiffs had among their goods in their own bonded cellar, of which they kept one key and the Custom-house officers another. This was the usual mode of selling in bond in Bristol, where plaintiffs were carrying on business as spirit merchants. An invoice, describing the marks of the packages, the ships by which they had been imported, and the contents, was enclosed to the defendant in a letter, saying: "The above remain in bond, and which you will find of a very good quality, and hope will merit the continuance of your favors." After the credit had expired, the defendant, when applied to for payment, requested that the goods might continue a further time in bond, and asked plaintiffs' traveller to sell the goods for him. He was referred to plaintiffs, and wrote to them, saying: "You will oblige by informing me of the present value of

¹ 30 L. J. Q. B. 264; 1 B. & S. 299. See, also, authorities cited in sec. 204, note 1. ² 29 L. J. Ex. 235; 30 L. J. Ex. 310, and 6 H. & N. 832.

the rum *and brandy, that is to say, what are you [*159] willing to give for it."

On these facts, Bramwell B. directed a nonsuit, with leave to plaintiff to move, the defendant having objected that there was no delivery or acceptance to satisfy the Statute of Frauds. *Held*, by the Court of Exchequer, that there had been no delivery or actual receipt; that as the goods remained under the control of the vendor, and in his possession till after the credit had expired, his lien had revived; and that in the interval while the credit was running, there had been nothing done to constitute actual receipt by the purchaser.

On the appeal to the Exchequer Chamber, Cockburn C. J. in giving his opinion said, that "for six months the buyer was entitled to claim the immediate delivery of the specific goods appropriated to him. The question then arises, whether the possession, which actually remained in the sellers, was a possession in the sellers *by virtue of their original property in the goods*, or *whether it had become a possession as agents and bailees of the buyers*." The learned Chief Justice then went on to point out that there was sufficient evidence of a change of character in the possession to go to the jury, in the facts proven, that is, that the purchaser "dealt with the goods as his own, first, in the request that the sellers would take back the goods, and failing in the request, in asking the plaintiffs to sell the goods for him."

Crompton J. pointed out that the Court did not differ from the Court of Exchequer save on one point, namely, that "there was some evidence that the character of plaintiffs was changed to that of warehousemen," and said that "according to the authorities there may be such a change of character in the seller as to make him the agent of the buyer, so that the buyer may treat the possession of the seller as his own."³

³ See *Chase v. Willard*, 57 Me. 157; *Means v. Williamson*, 37 Me. 556; *Houdlette v. Tallman*, 14 Me. 400; *Hatch v. Lincoln*, 66 Mass. (12 Cush.) 31; *Riddle v. Barnum*, 37 Mass. (20 Pick.) 280; *Tuxworth v. Moore*, 26 Mass. (9 Pick.) 348; *Chapman v. Searle*, 20 Mass. (3 Pick.) 88; *Lane v. Sleeper*, 18 N. H. 214; *Grove v. Brien*, 49 U. S. (8 How.) 429; bk. 12, L. ed. 1142; *Gibson v. Stevens*, 49 U. S. (8 How.) 384; *Barrett v. Goddard*, 3

§ 209. It will already have been perceived that in many of the cases, the test for determining whether there has been an actual receipt by the purchaser, has been to [*160] inquire whether *the vendor has lost his lien.¹ Receipt implies delivery,² and it is plain that so long as vendor has not delivered, there can be no actual receipt by vendee.³ The subject was placed in a very clear light by Holroyd J. in his decision in *Baldey v. Parker*:⁴ "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession, and, therefore, as long as the seller preserves his control over the goods so as to retain his lien he prevents the vendee from accepting and receiving them as his own within the meaning of the statute."⁵ No exception is known in the whole series of decisions to the propositions here enunciated, and it is safe to assume as a general rule, that whenever no fact has been proven showing

Mason C. C. 107. See, also, *ante*, § 204, note 1, "Vendor as bailee."

Acceptance may be before actual receipt. — *Ex parte Safford*, 2 *Low. C. C.* 563; *Cusack v. Robinson*, 1 *Best & S.* 299.

¹ See *post*, Book V. Part 1, Ch. 4, on Lien of Vendor.

² *Per Parke B.* in *Saunders v. Topp*, 4 *Ex.* 394.

³ *Acceptance implies delivery*; because there can be no delivery without acceptance. *Young v. Blaisdell*, 60 *Me.* 272, 275; *Maxwell v. Brown*, 39 *Me.* 98; *Shindler v. Houston*, 1 *N. Y.* 261, 265; *s. c.* 49 *Am. Dec.* 316. See *Tempest v. Fitzgerald*, 3 *Barn. & Ald.* 680; *Baldey v. Parker*, 2 *Barn. & Cres.* 37; *Holmes v. Hoskins*, 9 *Exch.* 753; *s. c.* 28 *Eng. L. & Eq.* 564.

⁴ 2 *Barn. & Cres.* 37.

⁵ *Vesting possessions.* — It is well established that "there must be a vesting of the possession of the goods in the vendee as absolute owner, discharged of all lien for the price on the part of the vendor." *Stone v.*

Browning, 51 *N. Y.* 211, 215; *Shindler v. Houston*, 1 *N. Y.* 261, 265; *s. c.* 49 *Am. Dec.* 316. See *Gardet v. Belknap*, 1 *Cal.* 399; *Maxwell v. Brown*, 39 *Me.* 98, 103; *s. c.* 61 *Am. Dec.* 605; *Dodge v. Morse*, 129 *Mass.* 423; *Safford v. McDonough*, 120 *Mass.* 290; *Knight v. Mann*, 118 *Mass.* 143; *Marsh v. Rouse*, 44 *N. Y.* 643; *Rathbun v. Rathbun*, 6 *Barb. (N. Y.)* 93; *Bailey v. Ogden*, 3 *Johns. (N. Y.)* 394, 399; *Brand v. Focht*, 3 *Keyes (N. Y.)* 409; *Russell v. Minor*, 22 *Wend. (N. Y.)* 659; *Outwater v. Dodge*, 6 *Wend. (N. Y.)* 400; *Green v. Merriam*, 28 *Vt.* 801; *Ex parte Safford*, 2 *Low. C. C.* 563, 565. See, also, *Tempest v. Fitzgerald*, 3 *Barn. & Ald.* 683; *Howe v. Palmer*, 3 *Barn. & A.* 321; *Baldey v. Parker*, 2 *Barn. & Cres.* 37, 44; *Holmes v. Hoskins*, 9 *Ex.* 752; 2 *Kent Com.* 500.

In Canada, however, it is held that the question whether or not the vendor parted with his lien is not the test by which to determine the sufficiency of the buyer's receipt. *Wegg v. Drake*, 16 *Up. Can. Q. B.* 252.

an abandonment by the vendor of his lien, no actual receipt by the purchaser has taken place. This has been as strongly insisted on in the latest as in the earliest cases. The principal decisions to this effect are referred to in the note.⁶

§ 210. It may be useful here to advert to one case in which the circumstances were very peculiar.

In *Dodsley v. Varley*,¹ wool was bought by the defendant from the plaintiff. The price was agreed on, but the wool would have to be weighed. It was sent to the warehouse of a person employed by the defendant, was weighed, and packed up with other wools in sheeting provided by the defendant. It was the usual course for the wool to remain at this warehouse till paid for, and this wool had not been paid for. The defendant insisted that the vendor's lien remained, and that the wool therefore had not been actually *received by him as purchaser. But the [*161] Court held that the property had passed, that the goods had been delivered, and were at the risk of the purchaser. In relation to the vendor's right, the Court said: "The plaintiff had not what is called a lien, determinable on the loss of possession, but a special interest, sometimes, but improperly, called a lien, growing out of his original ownership, and consistent with the property being in the defendant. This he retained in respect of the term agreed on, that the goods should not be removed to their ultimate place of destination before payment." It is plain that there is nothing in this case which conflicts with the rule, that there can be no actual receipt by purchaser while vendor's lien continues, for the Court held that the lien was gone. It may, however, be marked, that the effect attributed by the Court to the special agreement, that the goods should remain in the

⁶ *Howe v. Palmer*, 3 B. & Ald. 321; *Tempest v. Fitzgerald*, 3 B. & Ald. 680; *Carter v. Toussaint*, 5 B. & Ald. 855; *Baldey v. Parker*, 2 B. & C. 67; *Smith v. Surman*, 9 B. & C. 561; *Bill v. Bament*, 9 M. & W. 37; *Phillips v. Bistolli*, 2 B. & C. 511; *Hawes v. Watson*, 2 B. & C. 540; *Maberley v. Sheppard*, 10 Bing. 101;

Holmes v. Hoskins, 9 Ex. 753; *Cusack v. Robinson*, 30 L. J. Q. B. 264; *Castle v. Swarder*, 29 L. J. Ex. 235; s. c. 30 L. J. Ex. 310, and 6 H. & N. 832; *Morton v. Tibbett*, 15 Q. B. 428, and 19 L. J. Q. B. 382.

¹ 12 Ad. & E. 632. See, also, *Pinkham v. Mattox*, 53 N. H. 600.

defendant's warehouse without removal till paid for, is much greater than was accorded to a similar stipulation, in the case of *Howes v. Ball*,² where the question was raised in a more direct form than in *Dodsley v. Varley*. In this last-mentioned case, where the litigation was between the vendor and the administrator of the deceased purchaser, the Court held that the property had passed in the thing sold, and that the special stipulation between the parties might, perhaps, amount to a personal license in favor of the vendor to retake the thing sold, if not paid for at the expiration of the credit allowed; but that such license could not be available against a transferee of the thing, as a sub-vendee, or the administrator of the vendee.

² 7 Barn. & Cres. 484. See a similar case in *Pinkham v. Mattox*, 53 N. H. 600.

*CHAPTER V.

[*162]

OF EARNEST OR PART PAYMENT.

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§ 211. THE giving of earnest,¹ however common in ancient times, has fallen so much into disuse, that the two expressions in this clause of the statute, "giving something in earnest" and "giving something in part payment," are often treated as meaning the same thing, although the language clearly intimates that the earnest is "*something*" that "binds the bargain," whereas it is manifest that there can be no

¹ *Earnest*. — The idea of "Earnest" in connection with contracts was taken from the civil law (Güterbock on Bracton (Am. Trans.) 145; Baker on Sales, 297 *et sequa*), and was adopted by the old common law as a method of binding a bargain, and the Statute of Frauds simply recognized it as in force at that time and perpetuated the custom. See Glamvil, ch. 14. The custom of giving something in "earnest" has fallen into general disuse and seems rather to be suited to the manners of the simple and unlettered ages, before the introduction of writing, than to the more precise and accurate habits of dealing at the present time. As to the purpose of the giving of earnest,

see *Thompson v. Alger*, 53 Mass. (12 Metc.) 428, 436. Some cases hold that the mere payment of earnest does not always transfer title to the specific property for which it is given, but that it simply binds the contract. *Jennings v. Flanagan*, 5 Dana (Ky.) 217; s. c. 30 Am. Dec. 683.

"*Striking off a bargain*." — Formerly they had a curious custom, instead of paying anything in earnest, to draw the edge of a shilling across the hand of the vendor by the vendee, which was called striking off a bargain and was intended to bind the contract. See *Pinkham v. Mattox*, 53 N. H. 600, 603; *Blenkinsop v. Clayton*, 7 Taunt. 597; s. c. 1 J. B. Moore, 328; Story on Sales, § 273.

part payment till after the bargain has been bound, or closed. Earnest may be money,² or some gift or token,³ (among the

² *Combs v. Bateman*, 10 Barb. (N. Y.) 573; *White v. Drew*, 56 How. Pr. (N. Y.) 57; *Hunter v. Wetsell*, 17 Hun (N. Y.) 135; s. c. 84 N. Y. 549; 38 Am. Rep. 544; *Dow v. Worthen*, 37 Vt. 108.

Deposit of money with a third person to be paid by him to either in case the other fails to fulfil his part of the contract, is not "earnest" within the meaning of the Statute of Frauds, *Howe v. Hayward*, 108 Mass. 54; s. c. 11 Am. Rep. 306; and the same is true of the deposit of a check for that purpose. *Noakes v. Morey*, 30 Ind. 103. As used in the Statute of Frauds, "earnest" is regarded as a part payment of the price. *Howe v. Hayward*, 108 Mass. 54; s. c. 11 Am. Rep. 306; *Walker v. Nussey*, 16 Mees. & W. 302; *Langfort v. Tiler*, 1 Salk. 113; *Portage v. Cole*, 1 Saund. 319; *Morton v. Tibbett*, 15 Q. B. 428; 2 Bl. Com. 247; 1 Dane Abr. 235.

Payment may be made in money or in property or in the discharge of a debt in whole or in part, due from the vendor to the purchaser. The giving of valuable information or the extinguishment of a promise to pay a promissory note, held by the latter against the former.

Payment by note.—Thus it is held in *Combs v. Bateman*, 10 Barb. (N. Y.) 573, that the delivery of a note of a third person in satisfaction is an absolute payment (see, also, *Porter v. Talcott*, 1 Cow. (N. Y.) 359; *Breed v. Cook*, 15 Johns. (N. Y.) 241; *Whitbeck v. Van Ness*, 11 Johns. (N. Y.) 409; s. c. 6 Am. Dec. 383; *Butler v. Haight*, 8 Wend. (N. Y.) 535), but that the delivery of the purchaser's own note is not a payment. *Krohn v. Bantz*, 68 Ind. 277. See, also, *Scott v. Bush*, 26 Mich. 418; s. c. 12 Am. Rep. 311; *Grimes v. Van Vechten*, 20 Mich. 410; *Smith v. Rowley*, 34 N. Y. 367; *Combs v. Bateman*, 10 Barb. (N. Y.)

573; *Nichols v. Mitchell*, 30 Wis. 329; *Hooker v. Knab*, 26 Wis. 511. It is a well settled rule in law, that in the absence of a special agreement to the contrary, the taking of a promissory note for a preëxisting debt, or a contemporary consideration, is *prima facie*, a conditional payment only. *McCrary v. Carrington*, 35 Ala. 698; *Brown v. Cronise*, 21 Cal. 386; *Smith v. Owens*, 21 Cal. 11; *Higgins v. Wortell*, 18 Cal. 330; *Bill v. Porter*, 9 Conn. 23; *Smalley v. Edey*, 19 Ill. 207; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501; *Morrison v. Welty*, 18 Md. 169; *Hall v. Richardson*, 16 Md. 396; s. c. 77 Am. Dec. 303; *Keough v. McNitt*, 6 Minn. 513; *Devlin v. Chamblin*, 6 Minn. 468; *Howard v. Jones*, 33 Mo. 583; *Citizens' Bank v. Carson*, 32 Mo. 191; *McMurray v. Taylor*, 30 Mo. 263; s. c. 67 Am. Dec. 611; *Vancelef v. Therason*, 20 Mass. (3 Pick.) 12; *Elliot v. Sleeper*, 2 N. H. 525; *Smith v. Smith*, 27 N. H. (7 Fost.) 253; *Muldon v. Whitlock*, 1 Cow. (N. Y.) 290; *Putnam v. Lewis*, 8 Johns. (N. Y.) 389; *Murray v. Gouverneur*, 2 Johns. Cas. (N. Y.) 438; s. c. 1 Am. Dec. 177; *Holmes v. De Camp*, 1 Johns. (N. Y.) 34; s. c. 3 Am. Dec. 293; *Sheehy v. Mandeville*, 6 Cr. 253, 264; *Owenson v. Morse*, 7 T. R. 64; *Puckford v. Maxwell*, 6 T. R. 52; *Bridges v. Berry*, 3 Taunt. 130. See, also, *post*, §§ 404, 438. However, it would seem that payment by check of the purchaser is a valid payment. See *Gould v. Town of Oneonta*, 71 N. Y. 307.

Discharge of a preëxisting obligation, either in whole or in part, is a valid payment. *Matthiessen & W. R. Co. v. McMahon*, Admr. 38 N. J. L. (9 Vr.) 536; *Brabin v. Hyde*, 32 N. Y. 519, 532; *Artcher v. Zeh*, 5 Hill (N. Y.) 200; *Dow v. Worthen*, 37 Vt. 108, 112; *Cleave v. Jones*, 6 Ex. 573; *Walker v. Nussey*, 16 Mees. & W.

Romans usually a ring,) given by the buyer to the vendor, and accepted by the latter to mark the final conclusive assent of both sides to the bargain; and this was formerly a prevalent custom in England.⁴

Examples are found in *Bach v. Owen*,⁵ in 1793, and *Goodall v. Skelton*,⁶ 1794, in the former of which a half-penny, and in the latter a shilling, was given in earnest of the bargain.

§ 212. Whether giving earnest has the effect of passing the property in the thing sold from the vendor to vendee

302. It is said in *Mattice v. Allen*, 3 Keyes (N. Y.) 492, that an agreement that the debt of the seller to the purchaser should be applied as a payment upon the price of the goods purchased, is not a payment at the time of making the contract within the meaning of the statute.

Part payment.—An agreement to pay part of the purchase price is not such a payment as is contemplated by the Statute of Frauds. *Brabin v. Hyde*, 32 N. Y. 519; *Mattice v. Allen*, 3 Keyes (N. Y.) 492. And neither is a promise by the buyer to pay over the purchase price to a third person, *Artcher v. Zeh*, 5 Hill (N. Y.) 200; but if the money should in the latter case be paid to such third person it will thereby render the contract binding. *Brady v. Harrahy*, 21 Up. Can. Q. B. 340; *Furniss v. Sawers*, 3 Up. Can. Q. B. 76. However, where such third person accepts the purchase for the amount of his claim and discharges the obligation as against the vendor it would seem that this makes the agreement a valid payment. *Cotterill v. Stevens*, 10 Wis. 422. See, also, *Crocker v. Higgins*, 7 Conn. 342; *Cabot v. Haskins*, 20 Mass. (3 Pick.) 83; *Arnold v. Lyman*, 17 Mass. 400; s. c. 9 Am. Dec. 154; *Farley v. Cleveland*, 4 Cow. (N. Y.) 432; s. c. 15 Am. Dec. 387; *Barker v. Bucklin*, 2 Den. (N. Y.) 45; s. c. 43 Am. Dec. 726; *Paine v. Fulton*, 34 Wis. 83; *Emerick v. Sanders*, 1 Wis. 77.

A tender of part payment where not

accepted is of course not sufficient. *Hawley v. Keeler*, 53 N. Y. 114; *Hicks v. Cleveland*, 48 N. Y. 84; *Walrath v. Ingles*, 64 Barb. (N. Y.) 265; *Edgerton v. Hodge*, 41 Vt. 676; *Kaitling v. Parkin*, 23 Up. Can. C. P. 569. Where accepted of course the payment will be valid. *White v. Allen*, 9 Ind. 561; *Furniss v. Sawers*, 3 Up. Can. Q. B. 77.

Part payment to agent is as valid as part payment to the vendor personally, provided the agent was authorized to accept payment or his receipt ratified by the principal. *Hawley v. Keeler*, 53 N. Y. 114; *Cotterill v. Stevens*, 10 Wis. 422; *Brady v. Harrahy*, 21 Up. Can. Q. B. 340.

³ Under the Roman law earnest "consisted merely of two kinds, the one (1) relating to agreement made anterior to the contract whereby a sum of money was given as a consideration of the right to purchase, should the buyer carry out his bargain, and earnest," was ejected from the price of the article; if on default, the earnest money was forfeited. (2) As to the second kind, *vide infra*, section 220. See *Parsons on Contracts*, Vol. III. 1-60; *Baker on Sales*, 297.

⁴ *Bracton*, 1, 2, c. 27. It seems to be agreed that the earnest must be money or money's worth; in other words, something of value, though the amount be immaterial. *Browne, Statute of Frauds*, § 341.

⁵ 5 T. R. 409.

⁶ 2 H. Bl. 316.

will be considered in a subsequent part of this treatise,¹ but for the present we are only concerned with the question of its effect in giving validity to a parol contract. The [*163] giving of earnest, *and the part payment of the price, are two facts independent of the bargain, capable of proof by parol; and the framers of the statute have said in effect that *either* of them, if proven in addition to parol proof of the contract itself, is a sufficient safeguard against fraud and perjury to render the contract good without a writing.²

§ 213. The former of these facts, that of giving something in earnest to "bind the bargain," has been the subject of only one reported case, that of *Blenkinsop v. Clayton*,¹ in which the buyer drew a shilling across the vendor's hand, and which the witness called "striking off the bargain" according to the custom of the country; but as the buyer then returned the coin to his own pocket, instead of giving it to

¹ *Post*, Book II. Ch. IV.

² *Omission of an essential.*—Where the parties in making a contract omit to do that which the Statute of Frauds require, the consent of both is necessary to supply the omitted part. See *Edgerton v. Hodge*, 41 Vt. 676.

When part payment may be made.—As a general rule where a part payment is made on the goods purchased, it is not necessary that it be made at the time of the sale but may be made at any time thereafter. *Davis v. Moore*, 13 Me. 424; *Townsend v. Hargraves*, 118 Mass. 325; *Marsh v. Hyde*, 69 Mass. (3 Gray) 331; *Thompson v. Alger*, 53 Mass. (12 Metc.) 428; *Gault v. Brown*, 48 N. H. 183, 189; *Vincent v. Germond*, 11 Johns. (N. Y.) 283; *Sprague v. Blake*, 20 Wend. (N. Y.) 61; *Brady v. Harrahy*, 21 Up. Can. Q. B. 340.

However, it is a question whether a subsequent payment will validate a verbal contract of sale, which is invalid under the statute. The affirmative is maintained in *Hunter v. Wet-sell*, 84 N. Y. 549; s. c. 38 Am. Rep. 544; and *Bissell v. Balcom*, 39 N. Y.

275. See, also, *Allis v. Read*, 45 N. Y. 142; *Webster v. Zeilly*, 52 Barb. (N. Y.) 482; and the negative in *Hawley v. Keeler*, 53 N. Y. 114, 120. See, also, *Van Woert v. Albany & S. Ry. Co.*, 67 N. Y. 538; *Hunter v. Wet-sell*, 57 N. Y. 375; s. c. 15 Am. Rep. 508; *Harteau v. Gardner*, 51 N. Y. 678; *Allis v. Read*, 45 N. Y. 142; *Bissell v. Balcom*, 39 N. Y. 275; *McKnight v. Dunlop*, 5 N. Y. 537; s. c. 55 Am. Dec. 370; *Allan v. Aguirre*, 5 N. Y. Leg. Obs. 380; *Rappleve v. Ades*, 65 Barb. (N. Y.) 589; *Boutwell v. O'Keefe*, 32 Barb. (N. Y.) 434; *Buskirk v. Cleveland*, 41 Barb. (N. Y.) 610; *Ely v. Ormsby*, 12 Barb. (N. Y.) 570; *Artcher v. Zeh*, 5 Hill (N. Y.) 200; *Sale v. Darragh*, 2 Hilt. (N. Y.) 184; *Ham v. Van Orden*, 4 Hun (N. Y.) 709; *Walrath v. Richie*, 5 Lans. (N. Y.) 362; *Hayman v. American Pat. Sponge Co.*, 6 N. Y. Week. Dig. 357. But where there has been delivery and acceptance of property under a contract otherwise void under the statute, this renders it valid. *Sprague v. Blake*, 20 Wend. (N. Y.) 61.

¹ 7 Taunt. 597.

the vendor, the Court necessarily held that the statute had not been satisfied.

There is another case,² in which the plaintiff was non-suited in an action on a contract of sale, where a shilling earnest-money was actually given by the buyer to bind the bargain, but the case turned entirely on the form of action, which was for goods *sold and delivered*, under circumstances where the Court was of opinion that there had been no delivery. A count for goods bargained and sold would no doubt have been sustained.

§ 214. On the subject of part payment, there is but one important decision under this clause of the statute; but the cases which have arisen under analogous clauses in the Statutes of Limitations and the Bankruptcy Acts may be considered with advantage in this connection.¹

§ 215. An agreement for the purchase of goods exceeding 10*l.* in value, was made with the understanding, and as part of the contract, that the vendor should deduct from the price

² Goodall v. Skelton, 2 H. Bl. 316.

¹ *Part payment of something of value on the purchase of property is necessary to make a valid transfer.* Krohn v. Bantz, 68 Ind. 277, overruling Harper v. Miller, 27 Ind. 277; Foster v. Lumberman's Mining Co., (Mich.) 12 West. Rep. 530; Bissell v. Balcom, 39 N. Y. 275. See, also, Brady v. Harrahy, 21 Up. Can. Q. B. 340; Furniss v. Sawers, 3 Up. Can. Q. B. 77.

To constitute a valid transfer of the property there must be a valid payment of something of value on the purchase price, a mere promise to pay being insufficient under the statute. See Krohn v. Bantz, 68 Ind. 277; Foster v. Lumbering Mining Co., (Mich.); 12 West. Rep. 530; Bissell v. Balcom, 39 N. Y. 275; Brabin v. Hyde, 32 N. Y. 519; Brand v. Brand, 49 Barb. (N. Y.) 348; Teed v. Teed, 44 Barb. (N. Y.) 96; Buskirk v. Cleveland, 41 Barb. (N. Y.) 610; Ely v. Ormsby, 12 Barb.

(N. Y.) 571; Artcher v. Zeh, 5 Hill. (N. Y.) 200; Mattice v. Allen, 3 Keyes (N. Y.) 492; Walrath v. Richie, 5 Lans. (N. Y.) 362. See, also, § 211, note 2.

As to goods taken on account of a debt validating a contract under the statute, see Teed v. Teed, 44 Barb. (N. Y.) 96; Ely v. Ormsby, 12 Barb. (N. Y.) 570; Brabin v. Hyde, 32 N. Y. 519; Shindler v. Houston, 1 N. Y. 264; s. c. 49 Am. Dec. 316; Artcher v. Zeh, 5 Hill (N. Y.) 200; Mattice v. Allen, 3 Keyes (N. Y.) 492; Walrath v. Richie, 5 Lans. (N. Y.) 362; Clark v. Tucker, 2 Sandf. (N. Y.) 157; Dow v. Worthen, 37 Vt. 108; Walker v. Nussey, 16 Mees. & W. 302. See, also, Pitney v. Glen's Falls Ins. Co., 65 N. Y. 6, 27; Davis v. Spencer, 24 N. Y. 386; Brand v. Brand, 49 Barb. (N. Y.) 348; Wylie v. Kelly, 41 Barb. (N. Y.) 594; Mattice v. Allen, 3 Keyes (N. Y.) 493. See, also, Brown v. Wade, 42 Iowa, 647, 651; Cotterill v. Stevens, 10 Wis. 422.

the amount of a debt previously due by him to the purchaser. The vendor then sent the goods to the purchaser with an invoice charging him with the price 20*l.* 18*s.* 11*d.*, under which was written, "By your account against me, 4*l.* 14*s.*

11*d.*" The purchaser returned the goods as inferior [*164] * to sample. It was contended, on behalf of the ven-

dor, who brought an action for goods sold and delivered, that this credit of 4*l.* 14*s.* 11*d.* was a part payment of the price of the goods, sufficient to take the case out of the statute. Held not to be so. Platt B. said, "You rely on part of the contract itself, as being part performance of it." Pollock C. B. said, "Here was nothing but one contract, whereas the statute requires a contract, and if it be not in writing, something besides." Parke B. said, "Had there been a bargain to sell the leather at a certain price, and *subsequently* an agreement that the sum due from the plaintiff was to be wiped off from the amount of that price, or that the goods delivered should be taken in satisfaction of the debt due from the plaintiff, either might have been equivalent to part payment, as an agreement to set off one item against another is equivalent to payment of money. But as the stipulation respecting the plaintiff's debt was merely a portion of the contemporaneous contract, it was not a giving something to the plaintiff by way of earnest or in part payment then or subsequently. Alderson B. said: "The 17th section of the Statute of Frauds implies that to bind a buyer of goods of 10*l.* value without writing he must have done *two* things: first, made a contract; and next, he must have given something as earnest, or in part payment or discharge of his liability. But where one of the terms of an oral bargain is for the seller to take something in part payment, that term cannot alone be equivalent to part payment."¹

From this case it may be inferred that an agreement to set off a debt due to the buyer would be held to be a part payment, taking the case out of the statute, if made subsequently to the sale, or by an *independent* contract at the time of the

¹ Walker v. Nussey, 16 M. & W. (N. Y.) 96; Mattice v. Allen, 3 Keyes 302. See, also, Brabin v. Hyde, 32 (N. Y.) 492. N. Y. 519; Teed v. Teed, 44 Barb.

sale, such as the giving of a receipt by the buyer for the debt previously due to him, but the decision is express on the point that such an agreement, when part of the bargain for the purchase, one of the terms of the contract * of [*165] sale itself, is not such a part payment as is required to make a parol sale valid for an amount exceeding 10*l*.

§ 216. Under the Statute of Limitations, it has been held that where goods are supplied by agreement "on account" of a debt, this is part payment of the debt.¹ The decision to this effect given by the Exchequer in *Hart v. Nash*,² was followed by the Queen's Bench in *Hooper v. Stephens*.³ And the decisions under the Bankruptcy Act have been to the same effect.⁴

So, also, in *Blair v. Ormond*,⁵ it was held, under the Statute of Limitations, that an agreement by the debtor to board and lodge the creditor at a fixed price per week in deduction of the debt, was a part payment constituting a sufficient acknowledgment of the debt to take it out of the statute.

§ 217. There seems, therefore, no reason to doubt that the part payment required by the Statute of Frauds as an act in addition to the parol contract, in order to make a sale good, need not be made in money, but that any thing of value which by mutual agreement is given by the buyer and accepted by the seller "on account" or in part satisfaction of the price will be equivalent to part payment. The transfer to the vendor of a bill or note "on account" or in part

¹ *Goods taken on account*.—Where a sale is made on an agreement that the price shall be applied on the payment of a precedent debt, such price must be actually applied, by a receipt or otherwise, to bring it within the exception of the Statute of Frauds founded on a payment of all or part of the principal. *Gaddis v. Leeson*, 55 Ill. 522; *Matthiessen Weicher's Refining Co. v. McMahon*, 38 N. J. L. (9 Vr.) 536; *Brabin v. Hyde*, 32 N. Y. 519; *Davis v. Spencer*, 24 N. Y. 386; *Teed v. Teed*, 44 Barb. (N. Y.) 96; *Ely v. Ormsby*, 12

Barb. (N. Y.) 570; *Artcher v. Zeh*, 5 Hill (N. Y.) 200; *Mattice v. Allen*, 3 Keyes (N. Y.) 492; s. c. 3 Abb. App. Dec. 248; *Walrath v. Richie*, 5 Lans. (N. Y.) 362; *Clark v. Tucker*, 2 Sandf. (N. Y.) 167; *Dow v. Worthen*, 37 Vt. 108; *Cotterill v. Stevens*, 10 Wis. 422; *Walker v. Nussey*, 16 Mees. & W. 302.

² Cr. M. & R. 337.

³ 4 A. & E. 71.

⁴ *Wilkins v. Casey*, 7 T. R. 713; *Cannan v. Wood*, 2 M. & W. 465.

⁵ 17 Q. B. 423, and 20 L. J. Q. B. 444.

payment, would seem also to suffice to render the bargain valid.¹

In *Maber v. Maber*,² a gift of the interest due was held to be a part payment.

§ 218. The Roman law on the subject of earnest was very peculiar, and the texts which govern it might readily be misunderstood unless careful discrimination be observed. Earnest was of two kinds: one was an independent contract anterior to the agreement of sale; the other was accessory to the contract of sale after it had been agreed on, and [*166] was, *like the earnest of the common law, a proof that the bargain was concluded, *argumentum contractûs facti*.

§ 219. The independent contract of earnest was an agreement by which a man proposed to another to give him a sum of money for what we should term the option of purchase. If the sale afterwards took place, the earnest money was deducted from the price. If the purchaser declined completing the purchase, he forfeited the earnest money. If the party who had received earnest did not choose to sell when the option was claimed, he was bound to return the earnest money and an equivalent amount by way of forfeiture for disappointing the other in his option.¹

§ 220. The other species of earnest of the Roman law was the same as that of the common law. It might consist of a thing, as a ring, *annulus*, which either party, but generally the buyer, gave to the other as a sign, proof, or symbol of the conclusion of the bargain¹—and when money was given in earnest it was considered as being in part pay

¹ *Chamberlyn v. Delarive*, 2 Wils. 253; *Kearslake v. Morgan*, 5 T. R. 513; *Griffiths v. Owen*, 13 M. & W. 58.

Payment by check will be sufficient where the check is received in part payment; and where honored on presentment, will be considered as payment at the time when it was given. *Hunter v. Wetsell*, 84 N. Y. 549, 554; s. c. 38 Am. Rep. 544; s. c. 17 Hun

(N. Y.) 135; *Hawley v. Keeler*, 53 N. Y. 114; *Bissell v. Balcom*, 39 N. Y. 275; *Artcher v. Zeh*, 5 Hill (N. Y.) 200.

² L. R. 2 Ex. 153.

¹ L. 17, Cod. de Fid. Instr.; Pothier, *Vente*, Nos. 497, 8, 9. See, also, *Howe v. Hayward*, 108 Mass. 54; s. c. 11 Am. Rep. 308.

¹ Dig. 19, 1 de Act. Emp. et Vend. 11, § 6, Ulp.

ment of the price.² Varro gives this as the etymology of the word;³ “Arrhabo sic dicta, ut reliquum reddatur. Hoc verbum à Græco arrabon, reliquum, ex eo quod debitum reliquit;” — and the Institutes of Gaius⁴ give its true nature, “Quod sæpe arræ nomine pro emptione datur, non eo pertinet quasi sine arra conventio nihil proficiat: sed ut evidentiùs probari posset convenisse de pretio.”

§ 221. At a latter date, however, the Emperor Justinian made by statute an important change in the law of earnest, by providing that in all cases where it was given, whether the sale was in writing or not, and whether there was any stipulation to that effect or not, either party might rescind the sale by forfeiting the amount of the earnest money:

* The whole text is a remarkable one, giving full rules [*167] as to *form of the sale*, the *assent*, the *giving of earnest*, and the *right of rescission*. “Emptio et venditio contrahitur simul atque de pretio convenerit, quamvis nondum pretium numeratum sit ac ne arra quidem data fuerit; nam quod arræ nomine datur argumentum est emptionis et venditionis contractæ. Sed hæc quidem de emptionibus et venditionibus quæ *sine scriptura* consistunt obtinere oportet, nam nihil a nobis *in hujusmodi venditionibus* innovatum est. In his autem quæ *scriptura conficiuntur*, non aliter perfectam esse venditionem et emptionem constituimus, nisi et instrumenta emptionis fuerint conscripta, vel manu propria contrahentium, vel ab alio quidem scripta, a contrahentibus autem subscripta; et si per tabelliones fiunt, nisi et completiones acceperint et fuerint partibus absoluta. Donec enim aliquid deest ex his, et pœnitentiæ locus est, et potest emptor vel venditor, sine pœna recedere ab emptione. Ita tamen *impune eis recedere concedimus*, nisi jam arrarum nomine aliquid fuerit datum. Hoc etenim subsequuto, *sive in scriptis, sive sine scriptis* venditio celebrata est, is qui recusat adimplere contractum, si quidem est *emptor, per-*

² Dig. 18, 3, de Lege Commissoria, 8 Scæv. See, also, *Howe v. Hayward*, 108 Mass. 55; s. c. 11 Am. Rep. 306.

³ De Lingua Latina, lib. 5, § 175. The Greek ἀρραβών and the Latin arra are both modifications of the Hebrew

ἄραβον, a pledge, Gen. xxxviii. 17. This word was introduced by the Phœnicians into both Greece and Italy. See Skeat's Etm. Dict. p. 184.

⁴ Com. 3, § 139.

ut quod dedit: si vero venditor, duplum restituere compellitur, nec sibi satis nihil expressum est."¹ This text not only changed the antecedent law, by allowing either party to rescind the bargain by forfeiting the value of the earnest, but it made a further innovation by providing that when the parties had agreed to draw up their sale in writing, either might recede from the bargain until all the forms of a written contract had been fully completed; in derogation of the ante-Justinian law, which made the contract perfect by mutual assent before the writings were drawn up.²

§ 222. Pothier struggles, on the authority of Vinnius, to escape from the apparently plain meaning of this text of the Institutes, and maintains the old distinction, that after earnest given to bind the bargain, neither party can [*168] escape from his *obligations as vendor or purchaser, by the sacrifice of the amount of the earnest.¹ But this reasoning is scarcely satisfactory, and later authors consider the language of the text too absolute to be explained away.²

§ 223. The French civil code seems to reject Pothier's doctrine, and provides, art. 1590, "Si la promesse de vente a été faite avec des arrhes, chacun des contractants est maître de s'en départir, celui qui les a données en les perdant, et celui qui les a reçues en restituant le double." Singularly enough, however, the same discussion has sprung up under this text as under that of Justinian, and the commentators are divided, Toullier, Maleville, Duranton, and some others taking the side of Pothier, while Duvergier, Coulon, Deville-neuve, and Ortolan, are of the contrary opinion.¹

¹ Inst. lib. iii. tit. xxiii. 1.

² Dig. 18, 1, de Contrah. Empt. 2, § 1, Paul; Gaius, Comm. 3, § 139.

¹ Pothier, Vente, No. 508.

² Ortolan, Explication Hist. des Inst. vol. 3, p. 269.

¹ The references are given in Sirey & Gilbert, Code Annoté, art. 1590.

*CHAPTER VI.

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OF THE MEMORANDUM OR NOTE IN WRITING.

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§ 224. THIS clause of the statute is as follows: "Except that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto duly authorized."¹

[*170] * For an accurate notion of the true extent and bearing of this clause, it is indispensable to keep constantly in view the leading principles of the law of evidence relating to written contracts. The framers of the statute have in no way interfered with these principles. They have simply said that if the parties to be charged have signed some written note or memorandum of the contract, it shall be allowed to be good. What the legal effect of such a note or memorandum is to be in all other respects, is left entirely as it was at common law.

§ 225. Now at common law, parties entering into any contract, may either reduce its terms to writing, or may refer to some other writing already in existence, as containing the terms of their agreement, and when they do so, they are

¹ *Mortgages of personal property.*— At common law, mortgages of personal property were not required to be reduced to writing, and our stat-

ute only requires them to be reduced to writing and registered as affecting creditors and purchasers for value. *Butts v. Screws*, 95 N. C. 215.

bound by what is written, whether signed by them or not;¹ and they are not allowed to say that there was a mistake in the writing, and that they intended to agree to something different from its contents, for the very object of putting the agreement in writing, is to prevent disputes about what they intended. This rule of law is very inflexible. If, by the agreement, the whole contract is reduced to writing, or by mutual assent is to be taken as embraced in a pre-existing writing, neither party is allowed to offer proof that any additional terms were agreed to,² although, of course, when-

¹ See *Watkins v. Rymill*, L. R. 10 Q. B. Div. 178; *Bank of British North America v. Simpson*, 24 Up. Can. C. P. 354.

The writing need not be formal, a simple statement that the parties have agreed and that to which they have agreed, being sufficient. *Randall v. Rhodes*, 1 Curt. C. C. 92. See *McConnell v. Brillhart*, 17 Ill. 354; s. c. 65 Am. Dec. 661. See, also, *Nichols v. Johnson*, 10 Conn. 192; *Johnson v. Dodge*, 17 Ill. 433; *Doty v. Wilder*, 15 Ill. 407; s. c. 60 Am. Dec. 756; *Harrison v. Lane*, 4 Bibb (Ky.) 466; *Allen v. Roberts*, 2 Bibb (Ky.) 98; *Loomis v. Newhall*, 32 Mass. (15 Pick.) 159; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 273; *Frith v. Lawrence*, 1 Paige Ch. (N. Y.) 434; *Thayer v. Rock*, 13 Wend. (N. Y.) 53; *Mactier v. Frith*, 6 Wend. (N. Y.) 103; s. c. 21 Am. Dec. 262; *Pipkin v. James*, 1 Humph. (Tenn.) 326; s. c. 35 Am. Dec. 652; *Ide v. Stanton*, 15 Vt. 686; s. c. 40 Am. Dec. 698; *Clerk v. Wright*, 1 Atk. 12; *Buckmaster v. Harrop*, 7 Ves. 341. But the writing must contain enough on its face, or by reference, to fix the names of the parties, the interest or property, to be affected, and the consideration to be given. *McConnell v. Brillhart*, 17 Ill. 354; s. c. 65 Am. Dec. 661. See *Nichols v. Johnson*, 10 Conn. 192; *Doty v. Wilder*, 15 Ill. 407; s. c. 60 Am. Dec. 756; *Harrison v. Lane*, 4 Bibb (Ky.) 466; *Allen v. Roberts*, 2 Bibb (Ky.)

98; *Fowler v. Lewis*, 3 A. K. Marsh, (Ky.) 443; *Tharp v. Feltz*, 6 B. Mon. (Ky.) 6; *Bean v. Burbank*, 16 Me. 458; s. c. 33 Am. Dec. 681; *Taney v. Bachtell*, 9 Gill (Md.) 205; *Dorsey v. Wayman*, 6 Gill (Md.) 66; *Loomis v. Newhall*, 32 Mass. (15 Pick.) 159; *Webster v. Ela*, 5 N. H. 540; *Sherburne v. Shaw*, 1 N. H. 158; s. c. 8 Am. Dec. 47; *Van Alstine v. Wimple*, 5 Cow. (N. Y.) 162; *Abeel v. Radcliff*, 13 Johns. (N. Y.) 297; s. c. 7 Am. Dec. 377; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 273; *Frith v. Lawrence*, 1 Paige Ch. (N. Y.) 434; *Mactier v. Frith*, 6 Wend. (N. Y.) 103; s. c. 21 Am. Dec. 262; *Anderson v. Harold*, 10 Ohio, 402; *Dock v. Hart*, 7 Watts & S. (Pa.) 172; *Hill v. Roderick*, 4 Watts & S. (Pa.) 221; *Pipkin v. James*, 1 Humph. (Tenn.) 326; s. c. 34 Am. Dec. 652; *Ide v. Stanton*, 15 Vt. 686; s. c. 40 Am. Dec. 698; *Barry v. Coombe*, 26 U. S. (1 Pet.) 647; bk. 7, L. ed. 299; *Clerk v. Wright*, 1 Atk. 12; *Champlion v. Plummer*, 1 Bos. & Pul. N. R. 252; *Clinan v. Cooke*, 1 Sch. & Lef. 31; *Blagden v. Bradbear*, 12 Ves. 466. See, also, *Sale v. Darragh*, 2 Hilt. (N. Y.) 198; *Peltier v. Collins*, 3 Wend. (N. Y.) 459; s. c. 20 Am. Dec. 711; *Jeffcott v. No. Br. Oil Co.*, 8 Ir. R. C. L. 17.

² Where parties have reduced their contract to writing, such writing will be presumed to contain all their agreement, any previous conversation not merged in the writing being re-

ever a duty or obligation of any sort results by virtue of the law, or of local customs, or the usages of particular trades, from the written stipulations, such duty or obligation may not only be enforced, as though it were expressly included among the written terms, but is as carefully guarded by the rule now under consideration, as if expressed in the written paper, and cannot be contradicted or qualified by parol evidence.³

§ 226. But the common law does not prohibit parties from making contracts of which only part is in writing. A man may agree to build a carriage for another, and the description of the vehicle may be put in writing and the price may be agreed on by parol, or *vice versa*, or the parties [*171] may say in *substance, "we agree to what is contained in such a writing, with such additions and exceptions as we now agree upon by word of mouth," and there is no legal objection to this. Parol evidence may be

jected. *Winn v. Cox*, 5 Ga. 373; *Small v. Quincy*, 4 Me. (4 Greenl.) 497; *Stoops v. Smith*, 100 Mass. 63. 65; s. c. 63 Am. Rep. 1; *Ridgway v. Bowman*, 61 Mass. (7 Cush.) 268; *Pitcher v. Hennessey*, 48 N. Y. 415; *Carter v. Hamilton*, 11 Barb. (N. Y.) 147; *Clark v. New York Life Ins. & Trust Co.*, 7 Lans. (N. Y.) 322; *Daggett v. Johnson*, 49 Vt. 345, 348; *Groot v. Story*, 44 Vt. 200; *Hakes v. Hotchkiss*, 23 Vt. 231; *Tayloe v. Riggs*, 26 U. S. (1 Pet.) 591; bk. 7, L. ed. 275; *Henderson v. Cotter*, 15 Up. Can. Q. B. 345; *Mason v. Brunswick*, 15 Up. Can. Q. B. 300; *Eden v. Blake*, 13 Mees. & W. 614, 617; *Lockett v. Nicklin*, 2 Exch. 93, 97; *Goss v. Nugent*, 5 B. & Ad. 58, 64; *Meres v. Ansell*, 3 Wils. 275; *Morley v. Boothby*, 3 Bing. 107, 112; *Lewis v. Jones*, 4 Barn. & Cress. 506; *Kain v. Old*, 2 Barn. & Cress. 634; *Preston v. Merceau*, 2 Wm. Bl. 1249; 1 Sugden V. & P. (8th. Am. ed.) 158.

The general rule is that: "Where the parties to a contract have deliberately put their engagements into

writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of their engagements, it is conclusively presumed that every part of their contract was reduced to writing, and all oral evidence, therefore, of what was said during the negotiation of the contract or at the time of its execution, must be excluded on the ground that the parties have made the writing the only repository and memorial of the truth; and whatever is not found in the writing must be understood to have been waived and abandoned." *Van Sycle v. Dalrymple*, 32 N. J. Eq. (5 Stew.) 233, 826. See also *Chapin v. Dobson*, 78 N. Y. 74; s. c. 34 Am. Rep. 512; *Wilson v. Deen*, 74 N. Y. 531, 534.

³ Per *Blackburn J.*, in *Burges v. Wickham*, 3 B. & S. 669, 33 L. J. Q. B. 17. But see the language of *Williams J.*, in giving the decision of the Exchequer Chamber in *Clapham v. Langton*, 34 L. J. Q. B. 46; see, also, *Fawkes v. Lamb*, 31 L. J. Q. B. 98, and *Leak on Contr.* 197.

used to show what were the additions and exceptions, and the writing is conclusive as to the rest.¹

§ 227. When either a part, or the whole of an agreement, is thus made in writing, or by reference to a writing, the agreement in general cannot be proven by any other means than by adducing the writing itself in proof, so that independently of the statute, the writing is an indispensable part of the case of him who seeks to prove the agreement.¹ But this result only takes place when the writing is by the consent of both parties agreed to be that which settles and con-

¹ *Proving collateral agreement.*—A party may prove an oral collateral agreement, where such agreement is not inconsistent with the written contract. *Fusting's Ex'rs v. Sullivan*, 41 Md. 162; *Basshor v. Forbes*, 36 Md. 154; *Erskine v. Adeane*, L. R. 8 Ch. 766. See, also, *Weeks v. Medler*, 20 Kan. 57, 64; *Polk v. Anderson*, 18 Kan. 243; *Babcock v. Deford*, 14 Kan. 408; *Hersoin v. Henderson*, 21 N. H. 224; s. c. 53 Am. Dec. 185; *Lewis v. Seabury*, 74 N. Y. 409; s. c. 30 Am. Rep. 311; *Duparquet v. Knubel*, 24 Hun (N. Y.) 653; *Malone v. Dougherty*, 79 Pa. St. 46; *McBride v. Silverthorn*, 11 Up. Can. Q. B. 545. Where a contract is not required by the statute to be in writing, it may be expressed partly in writing and partly in a written understanding between the parties, in which case the understanding may be shown by parol. *St. Louis, L. & W. Ry. Co. v. Maddox*, 18 Kan. 546, 551. See, also, *Clarke v. Tappin*, 32 Conn. 56; *Morehead v. Murray*, 31 Ind. 418; *Healy v. Young*, 21 Minn. 389; *Moss v. Green*, 41 Mo. 389; *Hollins v. Claybrook*, 22 Mo. 405; *Lewis v. Seabury*, 74 N. Y. 409; s. c. 30 Am. Rep. 311; *Hope v. Balen*, 58 N. Y. 380; *Barker v. Bradley*, 42 N. Y. 316; s. c. 1 Am. Rep. 521. An unintelligible contract may be explained by parol, even though the subject-matter of it is within the statute. *Moulding v. Prussing*, 70 Ill. 151.

In Pennsylvania.—The English rule excluding parol evidence to vary a written contract, has not been adopted in all its stringency. See *Greenawalt v. Kohne*, 85 Pa. St. 369, 375; *Martin v. Berens*, 67 Pa. St. 459. It is said in *Greenawalt v. Kohne*, *supra*, that from *Hurst's Lessees v. Kirkbride*, decided in 1773, reported by V.-C. J. Tilgham in *Wallace v. Baker*, 1 Binn. (Pa.) 610, down to the present time, this court has uniformly held that where, at the execution of the writing, a stipulation has been entered into, a condition annexed, or a promise made by the word of mouth, upon faith of which the writing has been executed, that parol evidence is admissible, though it may vary and materially change the terms of the contract." See *Lippincott v. Whitman*, 83 Pa. St. 244; *Graver v. Scott*, 80 Pa. St. 88, 94; *Powell on Coal Co. v. McShain*, 75 Pa. St. 238; *Chalfant v. Williams*, 35 Pa. St. 212; *Miller v. Henderson*, 10 Serg. & R. (Pa.) 290.

In New York, this rule does not prevail, yet in *Chapin v. Dobson*, 78 N. Y. 74; s. c. 34 Am. Rep. 512, the buyer of chattels under a written contract of sale was allowed to prove a verbal agreement, on the faith of which the contract was executed, that he might return the chattels if he was not satisfied therewith.

¹ See *Caldwell v. Green*, 8 Up. Can. Q. B. 327.

tains their contract in whole or in part. The case is different, if one of the parties chooses to write down for himself, without the concurrence and assent of the other, or if a bystander, without the authority of both, should write out what they said. The writing of the bystander is not evidence at all in such a case, though he may use it to refresh his memory, if called as a witness; but if one of the parties had employed him to make the writing, or had admitted its accuracy, it would be receivable in evidence against him as an admission, and the same would be the case as to what one party had written down for himself. But such writing, not binding on both, would not be indispensable for legal proof of the contract, nor, although of great weight, would it be conclusive upon him against whom it is evidence, as being his admission.

§ 228. The Statute of Frauds leaves all this law quite as it was before.¹ If the contract be in writing, in whole or in part, it must be proven as containing the only legal evidence of the terms of the agreement, even though not signed or not sufficient under the statute to make the contract good, and though there be sufficient evidence of part payment or of part acceptance and receipt to establish the validity of the contract.² The writing in such a case is as indispensable in contracts for the sale of goods of less value than 10*l.*, as in those above that limit, and is as conclusive in settling what the terms of the bargain are as if the Statute of Frauds

¹ See *Williams v. Robinson*, 73 Me. 196. See, also, *Steel v. Fife*, 48 Iowa, 99; s. c. 30 Am. Rep. 388; *Mason v. Decker*, 72 N. Y. 595; s. c. 28 Am. Rep. 190.

As to proof of contract where the original memorandum has been lost, see *Jelks v. Barrett*, 52 Miss. 315; *Davis v. Robertson*, 1 Mill (S. C.) Const. 71; s. c. 12 Am. Dec. 611; *Washburn v. Fletcher*, 42 Wis. 152; *Ryan v. Salt*, 3 Up. Can. C. P. 83.

² *In Maine*, where a memorandum was signed by one party alone, and he agreed to furnish the other party

a specified quantity of the articles sold at a given price, but did not specify the time of delivery or of payment, it was held sufficient under the Statute of Frauds, and that oral evidence could be introduced to show that there was an agreement as to the time of delivery and payment. *Williams v. Robinson*, 73 Me. 186; s. c. 40 Am. Rep. 352. See *Bird v. Munroe*, 66 Me. 337; *Townsend v. Hargraves*, 118 Mass. 325; *Lerned v. Wannemacher*, 91 Mass. (9 Allen) 412.

had never been passed. And where a party has *signed a paper which is not a writing agreed upon [*172] between the two, as containing the terms of their agreement, his adversary may use the paper, if he please, as an admission made in his favor, but he is not bound to offer it, any more than he would be bound to prove a verbal admission of his adversary, nor is the effect of a written any greater than that of a verbal admission. In a word, it is always necessary to distinguish whether the writing is the contract of *both* parties, or the admission of *one*.³

§ 229. The two cases of *Ford v. Yates*,¹ and *Lockett v. Nicklin*,² afford an illustration of the effect of the Statute of Frauds, taken in connection with the common law rules of evidence on this subject. In *Ford v. Yates*, the memorandum of the sale made between the parties said nothing as to credit; it was a sale of two parcels of hops, one of 39 pockets, and the other of 5 pockets, both at 78 shillings. The vendor delivered the smaller parcel, but refused to deliver the 39 pockets without payment; and the Court held parol evidence inadmissible to show that the hops were sold at six months' credit, and that this had been the usual course of dealing between the parties. But in *Lockett v. Nicklin*, where the goods were ordered in a letter containing a reference to a conversation between the parties, and were supplied with an invoice, nothing being said either in the letter or the invoice about the terms of payment, parol evidence was received of an agreement to give six months' credit. The distinction made was, that in *Ford v. Yates* the action was based on a *written contract* contained in the memorandum which could not be varied by parol evidence, while in *Lockett v. Nicklin* the *sale was really by parol*, and the subsequent writings were merely offered in proof of a parol bargain which had become binding by the delivery and acceptance of the goods; so that the purchaser was at liberty to supplement the proof

³ The foregoing preliminary remarks are chiefly extracted from the very valuable treatise of Lord Black-

burn. See *Williams v. Robinson*, 73 Me. 186; s. c. 40 Am. Rep. 352.

¹ 2 M. & G. 549.

² 2 Ex. 93.

of the bargain, by showing that there was an additional stipulation; namely, an agreement for six months' credit.

[*173] § 230. * It is of course quite beyond the scope of the present treatise to enter with any minuteness into the law of evidence, but the examination of this clause of the statute would be very incomplete without some reference to the decisions which determine in what cases, for what purposes, and to what extent, parol evidence is admissible to affect the rights of the parties, when there exists a note or memorandum in writing of the bargain sufficient to satisfy the 17th section.

§ 231. It must be steadily borne in mind that the statute was not enacted for cases where the parties, either in person or by agents, have signed a written contract; for in those cases the common law affords by its rules quite a sufficient guarantee against frauds and perjuries as is provided by the statute. The intent of the statute was to prevent the enforcement of *parol* contracts above a certain value, unless the defendant could be shown to have executed the alleged contract by partial performance, as manifested by part payment, or part acceptance, or unless his signature to *some* written *note* or *memorandum* of the bargain — not to the bargain itself — could be shown.¹ The existence of the note or memorandum pre-supposes an antecedent contract by parol, of which the writing is a note or memorandum.²

[It is a simple deduction from this theory of the statute that parol evidence is always admissible to show that the

¹ See the remarks of Erle J., in *Sievevright v. Archibald*, 17 Q. B. 124; 20 L. J. Q. B. 529; of Williams J., in *Bailey v. Sweeting*, 9 C. B. N. S. 843; 30 L. J. C. P. 150; and of Lord Wensleydale in *Ridgway v. Wharton*, 6 H. L. C. 305. The statement in the text is to be found *passim* in the cases on this subject.

² A contract and memorandum are distinct. See *Lerned v. Wannemacher*, 91 Mass. (9 Allen) 412; *Marsh v. Hyde*, 69 Mass. (3 Gray) 333; *Williams v. Bacon*, 68 Mass. (2 Gray) 387, 391. See, also, *Phillips v. Oc-*

mulgee Mills, 55 Ga. 633; *Williams v. Robinson*, 73 Me. 186; s. c. 40 Am. Rep. 352; *Bird v. Munroe*, 66 Me. 337; *Davis v. Moore*, 13 Me. 424; *Hunter v. Giddings*, 97 Mass. 41, 44; *Gale v. Nixon*, 6 Cow. (N. Y.) 445; *Webster v. Zeilly*, 52 Barb. (N. Y.) 482; *Thompson v. Menck*, 4 Abb. App. Dec. (N. Y.) 400; *Ide v. Stanton*, 15 Vt. 690; s. c. 40 Am. Dec. 698; *Dominion Bank v. Knowlton*, 25 Grant (Ont.) 131; *Parton v. Crofts*, 16 C. B. (N. S.) 11, 21; *Richey v. Garvey*, 10 Ir. L. R. 544; 1 Sugden V. & P. (8th Am. ed.) 129.

writing which purports to be a note or memorandum of the bargain is not a record of any antecedent parol contract at all,³ for, as was said by Lord Selborne in *Jervis v. Berridge*,⁴ the Statute of Frauds "is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties."⁵

§ 232. * On the same principle parol evidence is [*174] admissible for the purpose of showing that the written paper is *not* a note or memorandum of the antecedent parol agreement, but only of part of it, and the decisions are quite in accordance with this view.

Thus, if the writing offered in evidence contains no reference to the price at which the goods were sold, parol evidence is admissible to prove that a price was actually fixed, and the writing is thus shown not to be a note of the agreement, but only of some of its terms.¹

So where a sale of wool was made by sample, and one of the terms of the bargain was that the wool should be in good dry condition, parol evidence was admitted to show this fact, and thus to invalidate the sold note signed by the broker, which omitted that stipulation.²

³ *Pym v. Campbell*, 6 E. & B. 370; *Wake v. Harrop*, 6 H. & N. 768; *Clever v. Kirkman*, 24 W. R. 159; 33 L. T. N. S. 672; *Hussey v. Horne-Payne*, 4 App. Cas. 311, *per* Lord Cairns, at p. 320.

⁴ 10 Ch. at p. 360.

⁵ *Leppoc v. Nat. Union Bank*, 32 Md. 136, 144; *Earle v. Rice*, 111 Mass. 17, 20; *Hildreth v. O'Brien*, 92 Mass. (10 Allen) 104; *Rennell v. Kimball*, 87 Mass. (5 Allen) 356; *James v. Muir*, 33 Mich. 223; *Wemple v. Knopf*, 15 Minn. 440; s. c. 2 Am. Rep. 147; *Butler v. Smith*, 35 Miss. 457, 463; *Wright v. McPike*, 70 Mo. 176, 179; *Grierson v. Mason*, 60 N. Y. 394; *Shughart v. Moore*, 78 Pa. St. 469; *McKesson v. Sherman*, 51 Wis. 303, 312; *Blake v. Coleman*, 22 Wis. 415.

When oral evidence excluded. — In order to exclude oral evidence of a contract, it must be first established that there is a subsisting written contract between the parties; and where the immediate issue is whether there is or was a writing covering the contract, it is not competent to exclude oral testimony bearing on that issue upon an assumption of such writing. To do so is to beg the question. *Kalamazoo N. M. Works v. Macalister*, 40 Mich. 84.

¹ *Elmore v. Kingscote*, 5 B. & C. 583; *Goodman v. Griffiths*, 1 H. & N. 674; s. c. 26 L. J. Ex. 145; *Acebal v. Levy*, 10 Bing. 376.

² *Pitts v. Beckett*, 13 Mees. & W. 743.

A broker's memorandum which is defective is insufficient to take the

[And in a recent Irish case, where the writing offered in evidence was the auctioneer's sales-book which contained no statement that the sale was by sample, parol evidence was admitted on behalf of the defendant, to prove that the sale was by sample, and that therefore the auctioneer's book was not a memorandum of the whole contract.³]

§ 233. And the same principle which permits the defendant to offer parol evidence, showing that the written note is imperfect, and therefore *not* such a note as satisfies the statute, forbids him who sets up the writing for the purpose of binding the other from supplementing the writing by parol proof of terms or stipulations not contained in it; for it is manifest, that by offering such proof, he admits that the writing does not contain a note of the bargain, but only part of it.¹

contract out of the Statute of Frauds. *Boardman v. Spooner*, 95 Mass. (13 Allen) 353. And in such case the vendor can be allowed to prove by usage of trade, that the cases are to be examined within a limited time; otherwise the sale will be admitted to be complete. *Boardman v. Spooner*, 95 Mass. (13 Allen) 353; *Coddington v. Goddard*, 82 Mass. (16 Gray) 436; *Davis v. Shields*, 26 Wend. 341.

A warranty of the quality of an article sold is an essential part of the bargain and should be set out in the note or memorandum of sale, and a memorandum omitting it renders the contract void, and parol evidence is admissible to take it out of the Statute of Frauds. *Peltier v. Collins*, 3 Wend. (N. Y.) 459; s. c. 20 Am. Dec. 711. See *Adams v. Gray*, 8 Conn. 11; s. c. 20 Am. Dec. 82; *Sale v. Darragh*, 2 Hilt. (N. Y.) 184, 198; *Etheridge v. Palin*, 72 N. C. 213. See sec. 233, note 1.

A contemporaneous agreement of warranty can be ingrafted by parol evidence on to a written contract of sale. *Pike v. Fay*, 101 Mass. 134; *Boardman v. Spooner*, 95 Mass. (13 Allen) 353; *Howe v. Walker*, 70 Mass. (4 Gray) 318; *Raymond v. Ray-*

mond, 64 Mass. (10 Cush.) 134; *Dutton v. Gerrish*, 63 Mass. (9 Cush.) 89; s. c. 55 Am. Dec. 45; *Warren v. Wheeler*, 49 Mass. (8 Metc.) 97; *Mayer v. Adrian*, 77 N. C. 83, 91.

³ *McMullen v. Helburgh*, L. R. 4 Ir. 94; s. c. on appeal, L. R. 6 Ir. 463. See, also, *Remick v. Sandford*, 118 Mass. 102; s. c. 120 Mass. 309; *Boardman v. Spooner*, 95 Mass. (13 Allen) 353.

¹ *Boydell v. Drummond*, 11 East, 142; *Fitzmaurice v. Bayley*, 9 H. L. C. 78; *Holmes v. Mitchell*, 7 C. B. N. S. 361, and 28 L. J. C. P. 201; *Harrow v. Groves*, 15 C. B. 667; 24 L. J. C. P. 53. See *Sugden on Vend. & P.* 140 note (d). See, also, *Jenness v. Mount Hope Iron Co.*, 53 Me. 20; *O'Donnell v. Leeman*, 43 Me. 158; *Dana v. Hancock*, 30 Vt. 616; *Salmon Falls Manuf. Co. v. Goddard*, 55 U. S. (14 How.) 446; bk. 14, L. ed. 498.

Supplying omission. — Where a memorandum in the usual form omitted the word sold before the name of the purchaser, it was held that it could not be contended, that such word was omitted by mistake (*Lee v. Hills*, 66 Ind. 474), for a contract required by the Statute of Frauds

[And this statement of the law was approved by O'Brien J. in the Irish case of *M'Mullen v. Helberg*, 4 L. R. Ir. 94, at p. 110.]

to be in writing cannot be partly in writing and partly in parol. *Marks v. Cass Co. Mill Co.*, 43 Iowa, 146; *Stevens v. Haskell*, 70 Me. 202; *Millett v. Marston*, 62 Me. 477; *Jenness v. Mount Hope Iron Co.*, 53 Me. 20, 24; *Lazear v. National Union Bank*, 52 Md. 78; s. c. 36 Am. Rep. 355; *Frank v. Miller*, 38 Md. 450, 460; *Keller v. Webb*, 126 Mass. 393; *Spence v. Bowen*, 41 Mich. 149; *Lang v. Henry*, 54 N. H. 57; *Caulkins v. Hellman*, 14 Hun. (N. Y.) 330; *Dana v. Hancock*, 30 Vt. 616; *Randall v. Rhodes*, 1 Curt. C. C. 90. While parol evidence is not admissible to add a warranty of quality or quantity to a written contract of sale (*Etheridge v. Palin*, 72 N. C. 213; see, also, sec. 232, note 2); or competent to supply an omission in the memorandum (*Lee v. Hills*, 66 Ind. 474, 481; *Baldwin v. Kerlin*, 46 Ind. 426; *Norris v. Blair*, 39 Ind. 90); yet the law will supply whatever is necessary or implied from the writing, although it is not expressed. See *Butler v. Thomson*, 92 U. S. (12 Otto) 412; bk. 23, L. ed. 684; *Salmon Falls Manuf. Co. v. Goddard*, 55 U. S. (14 How.) 446; bk. 14, L. ed. 493.

Where part of the price is paid whereby the Statute of Frauds has been satisfied, it would seem that the buyer may show a mistake in the memorandum of sale. *Kribs v. Jones*, 44 Md. 396, 408; *Allen v. Sowerby*, 37 Md. 411; *Chapin v. Dobson*, 78 N. Y. 74; s. c. 34 Am. Rep. 512; *Hicks v. Cleveland*, 48 N. Y. 84, 91; *Greenawalt v. Kohne*, 85 Pa. St. 369. However, see *Wiener v. Whipple*, 53 Wis. 298; s. c. 40 Am. Rep. 775. See, also, *Van Syckle v. Dalrymple*, 32 N. J. Eq. (5 Stew.) 233; *Schultz v. Coon*, 51 Wis. 416; *Hubbard v. Marshall*, 50 Wis. 322; *Low-*

ber v. Connit, 36 Wis. 176; *Whiting v. Gould*, 2 Wis. 552.

In the absence of fraud, accident, or mistake, parol evidence is incompetent to show a warranty, in the sale of articles by a written contract, containing no warranty. *Mast v. Pearce*, 58 Iowa, 579; s. c. 43 Am. Rep. 125; *Mumford v. McPherson*, 1 Johns. (N. Y.) 414; s. c. 3 Am. Dec. 339; *Van Ostrand v. Reed*, 1 Wend. (N. Y.) 424; *Powelton Coal Co. v. McShain*, 75 Pa. St. 238; *Dutton v. Tilden*, 13 Pa. St. 46; *Renshaw v. Gans*, 7 Pa. St. 117; *Clark v. Partridge*, 2 Pa. St. 13; *Campbell v. McClenachan*, 6 Serg. & R. (Pa.) 171.

Oral evidence is admissible to reform a written instrument, or to subvert or overthrow it entirely, but not to vary or alter it. Thus, where the parties to a contract have deliberately put their engagements into writing in such terms as import a legal obligation, without any uncertainty as to the object and extent of their engagements, it is conclusively presumed that every part of their contract was reduced to writing, and all oral evidence therefore of what was said during the negotiation of the contract, or at the time of its execution, must be excluded on the ground that the parties have made the writing the only repository and memorial of the truth, and whatever is not found in the writing must be understood to have been waived and abandoned. *Van Sykle v. Dalrymple*, 32 N. J. Eq. (5 Stew.) 233; *Locander v. Lounsbery*, 24 N. J. Eq. (9 C. E. Gr.) 420; *French v. Griffin*, 18 N. J. Eq. (3 C. E. Gr.) 280; *Huffman v. Hummer*, 17 N. J. Eq. (2 C. E. Gr.) 269; *Chetwood v. Brittan*, 2 N. J. Eq. (1 H. W. Gr.) 448; s. c. 4 N. J. Ch. (3 H. W. Gr.) 336; on appeal, 1 Hal. Ch.

§ 234. It is also on this principle that when the bargain is to be made out by separate written papers, parol evidence is not *allowed to connect them, but they must either be physically attached together, so as to show that they constitute but one instrument, or they must be connected by reference in the contents of one to the contents of the other,¹ as will be fully seen *infra* (pp. 185-193).

§ 235. But where a purchaser agreed to pay by a cheque¹ on his brother, the Court held that this was not one of the terms which need appear in the writing; and further, that parol

628; Chubb v. Peckham, 13 N. J. Eq. (2 Beas.) 207; Dewees v. Manhattan Ins. Co., 35 N. J. L. (6 Vr.) 372.

An exception to the rule as above stated is made in favor of parties not connected in any way with the agreement, and those persons may show by parol what the real agreement was. *McMaster v. Insurance Co. of N. A.*, 55 N. Y. 222; s. c. 14 Am. Rep. 239; *Coleman v. First Nat. Bank of Elmira*, 53 N. Y. 388; *Brown v. Thurber*, 77 N. Y. 613; s. c. 58 How. (N. Y.) Pr. 95. See, also, *Talbot v. Wilkins*, 31 Ark. 411, 420; *Hussman v. Wilke*, 50 Cal. 250; *Smith v. Moynihan*, 44 Cal. 53; *Crowley v. Pendleton*, 46 Conn. 62; *Badger v. Jones*, 29 Mass. (12 Pick.) 371; *Reynolds v. Magness*, 2 Ired. (N. C.) L. 26.

¹ *Hinde v. Whitehouse*, 7 East, 558; *Kenworthy v. Schofield*, 2 B. & C. 945; *Pierce v. Corf*, L. R. 9 Q. B. 210; *Rishton v. Whatmore*, 8 Ch. D. 467. But see *Baumann v. James*, 3 Ch. 508; *Long v. Millar*, 4 C. P. D. 450, C. A.; *Cave v. Hastings*, 7 Q. B. D. 125.

American cases. — *Knox v. King*, 36 Ala. 367; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Fowler v. Redican*, 52 Ill. 405; *Ridgway v. Ingram*, 50 Ind. 145, 148; s. c. 19 Am. Rep. 706; *O'Donnell v. Leeman*, 43 Me. 158; s. c. 69 Am. Dec. 54; *Freeport v. Bartol*, 3 Me. (3 Greenl.) 340; *Moale v. Buchanan*, 11 Gill & J. (Md.) 314;

Lerned v. Wannemacher, 91 Mass. (9 Allen) 417; *Williams v. Bacon*, 68 Mass. (2 Gray), 391; *Marton v. Dean*, 54 Mass. (13 Metc.) 385; *Johnson v. Buck*, 35 N. J. L. (6 Vr.) 344; s. c. 10 Am. Rep. 243; *Tallman v. Franklin*, 14 N. Y. 584; *Kurtz v. Cummings*, 24 Pa. St. 35; *Smith v. Arnold*, 5 Mason C. C. 416; *Price v. Griffith*, 1 De Gex, M. & G. 80; *Peek v. North Staffordshire Ry. Co.*, 10 H. L. Cas. 473, 568; *Peirce v. Corf*, L. R. 9 Q. B. 210; *Kaitling v. Parkin*, 23 Up. Can. C. P. 569.

An agreement to do something, which is not expressed on the face of the agreement signed, but is included in some other writing, parol evidence may be admitted to show what that writing is, so that the two, when taken together, constitute a contract within the Statute of Frauds. *Ridgway v. Wharton*, 6 H. L. Cas. 238. See, also, *Beckwith v. Talbot*, 2 Colo. 639; *Lee v. Mahony*, 9 Iowa, 344; *Rhoades v. Castner*, 94 Mass. (12 Allen) 130; *Spear v. Hart*, 3 Robt. (N. Y.) 420; *Ide v. Stanton*, 15 Vt. 685; s. c. 40 Am. Dec. 698; *Baumann v. James*, L. R. 3 Ch. Ap. 508; *Jackson v. Oglander*, 2 Hem. & M. 465; *Boyce v. Greene*, *Batty (Ir.)* 608; *Hope v. Dixon*, 22 Grant (Ont.) 439; *Phippen v. Hyland*, 19 Up. Can. C. P. 416.

¹ Such as to payment by a bill, *Mahalen v. The Dublin and Chapelizod Distillery Co.*, 11 Ir. R. C. L. 83.

proof that under the contract certain candlesticks were to be made with a gallery to receive a shade, did not affect the sufficiency of the writing which described them as "candlesticks complete."²

§ 236. Although parol evidence is not admissible to supply omissions or introduce terms, or to contradict, alter, or vary a written instrument, it is admissible for the purpose of identifying the subject-matter to which the writing refers.¹ Thus, where the written letter contained an agreement to purchase "your wool," parol evidence was admitted to apply the letter, and to show what was meant by "your wool."²

§ 237. Parol evidence is also admitted to show the situation of the parties at the time the writing was made, and the circumstances;¹ to explain the language, as for instance, to

² *Sarl v. Bourdillon*, 26 L. J. C. P. 78; s. c. 1 C. B. N. S. 188. See *Codington v. Goddard*, 82 Mass. (16 Gray) 436.

¹ *Bateman v. Phillips*, 12 East, 472; *Shortrede v. Cheek*, 1 A. & E. 57; *Mumford v. Gething*, 7 C. B. N. S. 305, and 29 L. J. C. P. 105; *Chambers v. Kelly*, 7 Ir. R. C. L. 231. See, also, *Swett v. Shumway*, 102 Mass. 367, 368; s. c. 3 Am. Rep. 471; *Miller v. Stevens*, 100 Mass. 518, 522; s. c. 1 Am. Rep. 139; *Stoops v. Smith*, 100 Mass. 63, 66; s. c. 1 Am. Rep. 85; *Caulkins v. Hellman*, 14 Hun (N. Y.) 330; *Waldron v. Jacob*, Ir. R. 5 Eq. 131.

The declaration of an auctioneer may be admitted to show what the property mentioned in a note or memorandum was. *Wright v. Deklyne*, 1 Pet. C. C. 199. See, also, *Ball v. Benjamin*, 73 Ill. 39; *Keller v. Webb*, 125 Mass. 88; s. c. 28 Am. Rep. 209; *Swett v. Shumway*, 102 Mass. 365; s. c. 3 Am. Rep. 471; *Sandford v. Newark & H. R. R.*, 37 N. J. L. (8 Vr.) 1; *Bickett v. Taylor*, 55 How. (N. Y.) Pr. 126; *Noyes v. Canfield*, 27 Vt. 79; *Barry v. Coombe*, 26 U. S. (1 Pet.) 640; bk. 7, L. ed. 299.

² *Macdonald v. Longbottom*, 28 L. Q. B. 293; s. c. on appeal, 1 E. & E. 977, and 29 L. J. Q. B. 256; and see *Shardlow v. Cotterell*, 20 Ch. D. 90, C. A.; reversing s. c. 18 Ch. D. 280, a case of a sale of real estate, where the word "property" was held to be a sufficient description.

¹ *Per Tindel C. J. in Sweet v. Lee*, 3 Man. & G. 466; s. c. 4 Scott, N. R. 77; 5 Jur. 1134.

Limiting the obligation of a written contract by parol.—The obligation of a written contract cannot be abridged or modified by, or made conditional upon, another proceeding, or contemporaneous parol agreement, not referred to in the writing itself. *Stoops v. Smith*, 100 Mass. 63. See, *Small v. Quincy*, 4 Me. (4 Greenl.) 497; *Prescott Bank v. Caverly*, 73 Mass. (7 Gray) 217; s. c. 66 Am. Dec. 473; *Hanchet v. Birge*, 53 Mass. (12 Metc.) 545; *Underwood v. Simmons*, 53 Mass. (12 Metc.) 275; *Adams v. Wilson*, 53 Mass. (12 Metc.) 138; s. c. 45 Am. Dec. 240; *St. Louis Ins. Co. v. Homer*, 50 Mass. (9 Metc.) 39; *Wakefield v. Stedman*, 29 Mass. (12 Pick.) 562; *Trustees of Church in Hanson v. Stetson*, 22 Mass. (5 Pick.) 506.

show that the bought and sold note have the same meaning among merchants, though the language seems to vary;² and to show the date when the bargain was made.³

So also may parol testimony be introduced, for the purpose of applying the terms of the written contract to the subject-matter, as well as for removing or explaining any, which arises from such application, for this purpose all the facts and circumstances of the transaction, at the time the contract arises, including the situation and relation of the parties. *Sutton v. Bowker*, 71 Mass. (5 Gray) 416; *Gerrish v. Towne*, 69 Mass. (3 Gray) 82; *Herring v. Boston Iron Co.*, 67 Mass. (1 Gray) 134; *Bradley v. Washington A. & G. Steam Packet Co.*, 38 U. S. (13 Pet.) 81, 98; bk. 10, L. ed. 72, 77; *Price v. Mouat*, 11 C. B. (N. S.) 508.

The subject-matter of the contract may be identified by parol proof of what was before the parties at the time of the negotiation, as samples or otherwise. *Haven v. Brown*, 7 Me. (7 Greenl.) 421; s. c. 22 Am. Dec. 208; *Clark v. Houghton*, 78 Mass. (12 Gray) 38; *Hogins v. Plympton*, 28 Mass. (11 Pick.) 97; *Bradford v. Manly*, 13 Mass. 139; s. c. 7 Am. Dec. 124. The terms of the negotiation itself, and statements made therein, may be resorted to for this purpose. *Sargent v. Adams*, 69 Mass. (3 Gray) 72; s. c. 63 Am. Dec. 718; *Foster v. Woods*, 18 Mass. 116; *Mumford v. Gething*, 7 C. B. (N. S.) 305; *Chadwick v. Burnley*, 12 Weekly Rep. (Q. B.) 1077. See *Putnam v. Bond*, 100 Mass. 58; *Sutton v. Bowker*, 71 Mass. (5 Gray) 416; *Woods v. Swain*, 70 Mass. (4 Gray) 322; *Gerrish v. Towne*, 69 Mass. (3 Gray) 82; *Sargent v. Adams*, 69 Mass. (3 Gray) 72; *Hall v. Davis*, 36 N. H. 569; *Hart v. Hammett*, 18 Vt. 127; *Salmon Falls Manuf. Co. v. Goddard*, 55 U. S. (14 How.) 446, 455; bk. 14, L. ed. 497; *Spicer v. Cooper*, 1 Q. B. 424.

Parol evidence to identify subject-

matter is admissible only when the writing does not distinctly define the article to be delivered, so as to enable the identity to be ascertained from the face of the transaction. *Pike v. Fay*, 101 Mass. 134, 137; *Miller v. Stevens*, 100 Mass. 518, 522; s. c. 1 Am. Rep. 139; *Stoops v. Smith*, 100 Mass. 63; s. c. 1 Am. Rep. 85; *Putnam v. Bond*, 100 Mass. 58; s. c. 1 Am. Rep. 82; *Hill v. Rewee*, 52 Mass. (11 Metc.) 268; *Bradford v. Manly*, 13 Mass. 139; s. c. 7 Am. Dec. 124; *Cullum v. Wagstaff*, 48 Pa. St. 300; *Hart v. Hammett*, 18 Vt. 127; *Gray v. Harper*, 1 Story C. C. 574; *Smith v. Wilson*, 3 Barn. & Ad. 738; *Spicer v. Cooper*, 1 Gale & Dav. 52; s. c. 1 Q. B. 424; *Clayton v. Gregson*, 6 Nev. & Man. 694; s. c. 5 Ad. & El. 302; *Noble v. Durell*, 3 T. R. 273, 275.

² *Bold v. Rayner*, 1 M. & W. 342; and *per Erle C. J.* in *Sievwright v. Archibald*, 17 Q. B. 124; 20 L. J. Q. B. 529.

³ *Edmunds v. Downs*, 2 C. & M. 459; *Hartley v. Wharton*, 11 Ad. & E. 934; *Lobb v. Stanley*, 5 Q. B. 574.

Parol evidence to explain or vary a written contract is not admissible when it is intelligible in its terms or which imposes upon it a sense which its terms do not imply. *Sayre v. Peck*, 1 Barb. (N. Y.) 464; *Hull v. Adams*, 1 Hill (N. Y.) 601; *Bayard v. Malcolm*, 1 Johns. (N. Y.) 467; s. c. 3 Am. Dec. 450; *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 425; *Parkhurst v. Cortland*, 1 Johns. Ch. (N. Y.) 274; *Jarvis v. Palmer*, 11 Paige (N. Y.) 650; *Crosier v. Acer*, 7 Paige Ch. (N. Y.) 137; *Lowber v. LeRoy*, 2 Sandf. (N. Y.) 202; *Thurston v. Ludwig*, 6 Ohio St. 5; s. c. 67 Am. Dec. 328; *Hagey v. Hill*, 75 Pa. St. 108; s. c. 15 Am. Rep. 583; *Ellmaker v. Franklin Fire Ins. Co.*, 5 Pa. St. 183; *Reed v. Jones*, 8 Wis. 392; *O'Harra*

[*It is also admissible to show that alterations [*176] which have been made in the document signed by

v. Hall, 4 U. S. (4 Dall.) 340; bk. 1, L. ed. 858; *Van Ness v. City of Washington*, 29 U. S. (4 Pet.) 232; bk. 7, L. ed. 842; *Dunlop v. Munroe*, 11 U. S. (7 Cr.) 242; bk. 3, L. ed. 329; *Smallwood v. Worthington*, 2 Cr. C. C. 431; *Preston v. Merceau*, 2 Wm. Bl. 1249; *Goss v. Nugent*, 5 Barn. & Ad. 64; *Coker v. Guy*, 2 Bos. & Pul. 565; *Adams v. Wordley*, 1 Mees. & W. 374.

Thus in the case of a contract in writing which provided for the sale of personal property and "lease satisfactory security" (the word "lease" having been interlined above the word "satisfactory" before signing) and which further provided that there was no verbal understanding, other than that expressly stated therein—to prove that the understanding of the parties was that if satisfactory security could not be given for a sale on credit, the property was to be leased. *Cooper v. Whitmer* (Pa.), 5 Cent. Rep. 197.

The exception to the rule, however, has been as well established as the rule itself, since the case of *Thompson v. White*, 1 U. S. (1 Dall.) 424; bk. 1, L. ed. 206; s. c. 1 Am. Dec. 252. And see *Oliver v. Oliver*, 4 Rawle (Pa.) 141; s. c. 26 Am. Dec. 123; *Hurst v. Kirkbride*, 1 Binn. (Pa.) 616; *Hultz v. Wright*, 16 Serg. & R. (Pa.) 345; s. c. 16 Am. Dec. 575; *Lyon v. Huntingdon Bank*, 14 Serg. & R. (Pa.) 283; *Thomson v. White*, 1 U. S. (1 Dall.) 424; bk. 1, L. ed. 206; s. c. 1 Am. Dec. 252.

Parol evidence to explain or vary a written contract.—See *Gately v. Irvine*, 51 Cal. 172; *Adams v. Gray*, 8 Conn. 11; s. c. 20 Am. Dec. 82; *Herd v. Bissel*, 1 Root (Conn.) 260; *Skinner v. Hendrick*, 1 Root (Conn.) 253; s. c. 1 Am. Dec. 43; *Polk v. Anderson*, 16 Kans. 243; *Breckinridge v. Duncan*, 2 A. K. Marsh.

(Ky.) 50; s. c. 12 Am. Dec. 359; *Brown v. Cobb*, 10 La. 172; *Bayton v. Tricou*, 5 Mart. (La.) 1; *Chamberlain v. Black*, 64 Me. 40; *Howard v. Rogers*, 4 Harr. & J. (Md.) 278; *Gittings v. Hall*, 1 Harr. & J. (Md.) 14; *King v. King*, 7 Mass. 496; *Bank of Hallowell v. Baker*, 1 Minn. 261; *Reynolds v. Insurance Co.*, 47 N. Y. 605; *Messmore v. New York Shot & Lead Co.*, 40 N. Y. 422; *Pollen v. LeRoy*, 30 N. Y. 549; *Draper v. Snow*, 20 N. Y. 331; s. c. 75 Am. Dec. 408; *Blossom v. Griffin*, 13 N. Y. 569; s. c. 67 Am. Dec. 75; *Dana v. Fiedler*, 12 N. Y. 40; s. c. 62 Am. Dec. 130; *Moore v. Meacham*, 10 N. Y. 207; *Meads v. Lansingh*, 1 Hopk. Ch. (N. Y.) 124; *Hagan v. Domestic, &c. Co.*, 9 Hun (N. Y.) 73; *Hawes v. Barker*, 3 Johns. (N. Y.) 506; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 273; *Tymason v. Bates*, 14 Wend. (N. Y.) 671; *Moser v. Libenguth*, 2 Rawle (Pa.) 428; *Heagy v. Umberger*, 10 Serg. & R. (Pa.) 342; *Hill v. Ely*, 5 Serg. & R. (Pa.) 363; s. c. 9 Am. Dec. 376; *McDermott v. United States Ins. Co.*, 3 Serg. & R. (Pa.) 607; *Church v. Church*, 4 Yeates (Pa.) 281; *Holmes v. Simons*, 3 Desaus. (S. C.) Eq. 149; s. c. 4 Am. Dec. 606; *Barkley v. Barkley*, 3 McC. (S. C.) 269; *South Carolina Society v. Johnson*, 1 McC. (S. C.) 41; *Pooser v. Tyler*, 1 McC. (S. C.) Eq. 18; *McFarlane v. Moore*, 1 Tenn. (Overt.) 174; s. c. 3 Am. Dec. 752; *Cole v. Howe*, 50 Vt. 35; *Foraythe v. Kimball*, 91 U. S. (1 Otto) 291; bk. 23, L. ed. 352; *Selden v. Myers*, 61 U. S. (20 How.) 506; bk. 15, L. ed. 543; *Garrison v. Memphis Ins. Co.*, 60 U. S. (19 How.) 312; bk. 15, L. ed. 656; *Salmon Falls Man'f'g Co. v. Goddard*, 55 U. S. (14 How.) 446; bk. 14, L. ed. 493; *Phillips v. Preston*, 46 U. S. (5 How.) 278; bk. 12, L. ed. 152; *Sprigg v.*

one of the parties were assented to by the other party; the effect of the evidence being not to vary the written instru-

Bank of Mt. Pleasant, 39 U. S. (14 Pet.) 201; bk. 10, L. ed. 419; Bradley v. Washington, A. & S. P. Co., 38 U. S. (13 Pet.) 89; bk. 10, L. ed. 72; Bank of United States v. Dunn, 31 U. S. (6 Pet.) 51; bk. 8, L. ed. 316; Shankland v. Mayor, &c. of Washington, 30 U. S. (5 Pet.) 390; bk. 8, L. ed. 166; Brent v. Bank of Metropolis, 26 U. S. (1 Pet.) 89; bk. 7, L. ed. 65; Renner v. Bank of Columbia, 22 U. S. (9 Wheat.) 581; bk. 6, L. ed. 166; Hunt v. Rousmanier, 21 U. S. (8 Wheat.) 174; bk. 5, L. ed. 589; Mechanics Bank v. Bank of Columbia, 18 U. S. (5 Wheat.) 326; bk. 5, L. ed. 100; Faw v. Marsteller, 6 U. S. (2 Cr.) 10; bk. 2, L. ed. 191; The Hermitage, 4 Blatchf. C. C. 474; Troy Iron & N. Co. v. Corning, 1 Blatchf. C. C. 467; Tilghman v. Tilghman, Bald. C. C. 464; Smith v. Hoffman, 2 Cr. C. C. 651; Ladd v. Wilson, 1 Cr. C. C. 293; Auld v. Hepburn, 1 Cr. C. C. 122; Randall v. Phillips 3 Mason C. C. 378; Peisch v. Dickson, 1 Mason C. C. 9, 11; Linville v. Holden, 2 McAr. C. C. 329; Kimble v. Lull, 3 McL. C. C. 272; Pomeroy v. Manin, 2 Paine C. C. 476; Kemmil v. Wilson, 4 Wash. C. C. 308; McCulloch v. Girard, 4 Wash. C. C. 289; The Waldo, Davies (2 Ware) N. S. D. C. 161. Because all previous conversations and verbal agreements are merged in a written agreement, and cannot be shown except for the purpose of construing the terms of a written agreement. Beckley v. Munson, 22 Conn. 299; Mann v. Smyser, 76 Ill. 365; Harlow v. Boswell, 15 Ill. 56; Cincinnati U. & F. W. Ry. Co. v. Pearce, 28 Ind. 502; Mann v. School Dist., 52 Iowa, 130; Filmer v. State Bank, 16 Iowa, 321; Jack v. Naber, 15 Iowa, 450; Stevens v. Haskell, 70 Me. 202; McFarland v. Boston & L. Railway Co., 115 Mass. 63; Stackpole

v. Arnold, 11 Mass. 30; s. c. 6 Am. Dec. 150; Peers v. Davis, 29 Mo. 184; Hill v. Syracuse, B. & N. Y. R. R. Co., 73 N. Y. 351; Van Bokkelen v. Taylor, 62 N. Y. 105; Baker v. Higgins, 21 N. Y. 397; Bogert v. Cauman, Anth. (N. Y.) 70.

Parol evidence to show custom.—Parol evidence is admissible to show the meaning of characters, marks, and technical terms used in the particular business, which are unintelligible to persons not acquainted therewith, where they occur in a written contract. Barton v. McKelway, 22 N. J. L. (2 Zab.) 165; Nelson v. Sun Mutual Ins. Co., 71 N. Y. 453; Walls v. Bailey, 49 N. Y. 464; Dana v. Fiedler, 12 N. Y. 40, 45; s. c. 62 Am. Dec. 130; Storey v. Salomon, 6 Daly (N. Y.) 531; Wilcox v. Wood, 9 Wend. (N. Y.) 346; Lowe v. Lehman, 15 Ohio St. 179. See, also, Pollmen v. LeRoy, 10 Bosw. (N. Y.) 55. Thus parol evidence has been admitted to show that the word "cash" in a contract, for the sale of goods by custom, means a credit of a few days. Steward v. Scudder, 24 N. J. L. (4 Zab.) 96. But see Foley v. Mason, 6 Md. 37; also "terms cash" upon a bill of parcels. George v. Joy, 19 N. H. 544; to explain "consignee six ms." at the bottom of a bill of parcels of goods sold, George v. Joy, *supra*; "horn chains," Swett v. Shumway, 102 Mass. 365; "their freight," in a contract to transport, Noyes v. Canfield, 27 Vt. 79; "of qualities," Whitney v. Broadman, 118 Mass. 242, 247. In a contract for the sale and delivery of a cargo of coal, "water nine and one-half feet," parol evidence has been held competent to show what number of tons of coal usually constituted the cargo of a vessel drawing nine and one-half feet of water. Rhoades v. Castner, 94 Mass. (12 Allen) 130. The court

ment but to show what was its condition when it became the memorandum of the contract.^{4]}

Parol evidence was likewise admitted to show that a sale of "fourteen pockets of Kent hops, at 100s., meant 100s. per cwt., according to the usage of the hop trade."⁵

[But it should be remembered that when the evidence in support of a trade usage seeks to alter the natural meaning and construction of the words as written, it must in every case be clear and consistent.^{6]}

Parol evidence is also admissible to show a mistake in drawing up the bought and sold notes (whereby certain goods were omitted), in an action of trover by the vendors against the purchaser for the goods so omitted after they had been paid for, and taken into possession by the purchaser.⁷

say in *Whitney v. Boardman*, 118 Mass. 242, 247, that "It is not necessary that terms should be technical, scientific, or ambiguous in themselves, in order to entitle a party to show by parol evidence the meaning attached to them by the parties to the contract. *Whitmarsh v. Conway Ins. Co.*, 82 Mass. (16 Gray) 359; s. c. 77 Am. Dec. 414.

The Supreme Court of the United States say in *Bradley v. Washington A. G. S. P. Co.*, 38 U. S. (13 Pet.) 89, bk. 10, L. ed. 72, that "The rule which admits extrinsic evidence for the purpose of applying a written contract to its proper subject-matter, extends beyond the mere designation of the thing on which the contract operates, and embraces within its scope the circumstances under which the contract concerning that thing was made."

Latent ambiguity in a written instrument, may be explained by parol evidence. *Piper v. True*, 36 Cal. 606; *Hotchkiss v. Barnes*, 34 Conn. 27; *Williams v. Waters*, 36 Ga. 454; *School Trustees v. Rodgers*, 7 Ill. App. 33; *Lovejoy v. Lovett*, 124 Mass. 270; *Hall v. Davis*, 36 N. H. 569; *Masters v. Freeman*, 17 Ohio St. 323; *McCullough v. Wainright*, 14 Pa. St. 171. But it is a general rule

to which, however, there are exceptions, that a patent ambiguity cannot be explained by parol. *Panton v. Tefft*, 22 Ill. 366; *Ely v. Adams*, 19 Johns. (N. Y.) 313; *Fish v. Hubbard*, 21 Wend. (N. Y.) 651; *Morris v. Edwards*, 1 Ohio, 189.

Fraud and mistake.—Parol evidence may be admitted to show fraud. *Pierce v. Wilson*, 34 Ala. 596; *Hunter v. Bilyeu*, 30 Ill. 228; *Hunt v. Carr*, 3 Greene (Iowa) 581; *Baltimore and P. Steamboat Co. v. Brown*, 54 Pa. St. 77; *Selden v. Myers*, 61 U. S. (20 How.) 506; bk. 15, L. ed. 916; *Hunt v. Rousmanier*, 21 U. S. (8 Wheat.) 174; bk. 5, L. ed. 589; *Bottomley v. United States*, 1 Story C. C. 135. And parol evidence is admissible to correct mistake. *Pierson v. McCahill*, 21 Cal. 122 s. c. 23 Cal. 249; *Sutton v. Sutton*, 25 Ga. 383; *Bush v. Tilley*, 49 Barb. (N. Y.) 599; *Keisselbrack v. Livingston*, 4 Johns. Ch. (N. Y.) 144.

⁴ *Stewart v. Eddowes*, L. R. 9 C. P. 311. See *Hicks v. Cleveland*, 48 N. Y. 84, 91.

⁵ *Spicer v. Cooper*, 1 Q. B. 424.

⁶ *Bowes v. Shand*, 2 App. Cas. 455.

⁷ *Steele v. Haddock*, 10 Ex. 643; 24 L. J. Ex. 78. See *Hicks v. Cleveland*, 48 N. Y. 84.

§ 238. Also to show that a written document, purporting to be an agreement, and signed by the parties, was executed, not with the intention of making a present contract, but like an escrow, or writing to take effect only on condition of the happening of a future event;¹ or was even to be modified upon some future contingency.²

Also to explain a latent ambiguity in a contract of sale, as where a bargain was made for the sale of cotton, "to arrive ex 'Peerless' from Bombay," parol evidence was held admissible to show that there were two ships "Peerless" from Bombay, and that the ship "Peerless" intended by the vendor was a different ship "Peerless" from that intended by the buyer; so as to establish a mistake defeating the contract for want of a *consensus ad idem*.³

§ 239. The admissibility of parol evidence of particular *commercial usages*¹ to engraft terms into the bargain, [*177] or even to *introduce conditions apparently at

¹ *Pym v. Campbell*, 6 E. & B. 370; 25 L. J. Q. B. 277; *Furness v. Meek*, 27 L. J. Ex. 34; *Davis v. Jones*, 25 L. J. C. P. 91.

² *Rogers v. Hadley*, 2 H. & C. 227; 32 L. J. Ex. 241.

"The rule, which excludes parol testimony to contradict or vary a written instrument, has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument." *Brick v. Brick*, 98 U. S. (8 Otto) 514, 516; bk. 25, L. ed. 256; *Peugh v. Davis*, 96 U. S. (6 Otto) 336; bk. 24, L. ed. 775.

³ *Raffles v. Wichelhaus*, 2 H. & C. 906; 33 L. J. Ex. 160. See *Hinne- mann v. Rosenback*, 39 N. Y. 98; *Atlantic T. & O. R. R. Co. v. Carolina Nat. Bank*, 86 U. S. (19 Wall.) 548; bk. 22, L. ed. 196; *Robinson v. United States*, 80 U. S. (13 Wall.) 363; bk. 20, L. ed. 653; *Thorington v. Smith*, 75 U. S. (8 Wall.) 1, 12; bk. 19, L. ed. 361.

¹ *Usage of trade* being a mode of conducting transactions of a particular kind, a course of dealing, it is a matter of fact and may be shown by persons familiar with its existence and uniformity, from their knowledge obtained by observation, or from their practice with others in the trade to which it relates. *Haskins v. Warren*, 115 Mass. 514. See, also, *Polhemus v. Heiman*, 50 Cal. 438; *Mears v. Waples*, 4 Houst. (Del.) 62; *Chicago v. P. & P. Co.*, 87 Ill. 547; *Coffman v. Campbell*, 87 Ill. 98; *Corbett v. Underwood*, 88 Ill. 324; s. c. 25 Am. Rep. 392; *Lyon v. Culbertson*, 83 Ill. 33; s. c. 25 Am. Rep. 349; *Doane v. Dunham*, 79 Ill. 131; *Converse v. Harzfeldt*, 11 Ill. App. 173; *Smyth v. Ex'r's of Ward*, 46 Iowa, 339; *Barker v. Borzone*, 48 Md. 474; *Marshall v. Perry*, 67 Me. 78; *Brown v. Foster*, 118 Mass. 136; s. c. 18 Am. Rep. 463; *Snelling v. Hall*, 107 Mass. 134; *Odione v. New Eng. Ins. Co.*, 101 Mass. 551; s. c. 3 Am. Rep. 404; *Reed v. Richardson*, 98 Mass. 216; *Carkin v. Savory*, 80 Mass. (14 Gray) 528; *Boardman v. Spooner*, 95 Mass.

variance with the implication resulting from the written stipulations (as was done in *Field v. Lelean*,² where evidence was admitted of a usage in the sale of mining shares, not to make delivery before payment, although the written terms were for a price payable *in futuro*), is too large a branch of the subject to be here treated in detail, and the reader must be referred to the decisions which are collected and classed in the notes to *Wigglesworth v. Dallison*, in the first volume of *Smith's Leading Cases*.³

[*Alexander v. Vanderzee*, L. R. 7 C. P. 530, and *Ashworth v. Redford*, L. R. 9 C. P. 20, are recent cases, which illustrate the method of construing particular mercantile terms apart from any trade usage.]

(13 Allen) 353; *Dodd v. Farlow*, 93 Mass. (11 Allen) 426; *Dickinson v. Gay*, 89 Mass. (7 Allen) 29; *Farmers' & Mechanics' Bank v. Erie R. R. Co.*, 72 N. Y. 188; *Read v. President, &c. of H. & D. C. Co.*, 3 Lans. (N. Y.) 213; s. c. 49 N. Y. 652; 2 Alb. L. J. 392; *Malcomson v. Morton*, 11 Ir. L. R. 230; *Page v. Myers*, 6 Ir. Jur. N. S. 364; *Hayes v. Nesbitt*, 25 Up. Can. C. P. 101; *Brown v. Browne*, 9 Up. Can. Q. B. 312.

Evidence as to custom.—Parol evidence is admissible to establish commercial usage or custom. *Whitney v. Boardman*, 118 Mass. 242; *Haskins v. Warren*, 115 Mass. 514, 536; *Miller v. Stevens*, 100 Mass. 518; s. c. 1 Am. Rep. 139; *Morse v. Brackett*, 98 Mass. 209; *Boardman v. Spooner*, 95 Mass. (13 Allen) 353, 359, 360; *Clark v. Baker*, 52 Mass. (11 Met.) 186; s. c. 45 Am. Dec. 199; *Steward v. Scudder*, 24 N. J. L. (4 Zab.) 96; *Robinson v. United States*, 80 U. S. (13 Wall.) 365; bk. 20, L. ed. 363; *Barnard v. Kellogg*, 77 U. S. (10 Wall.) 383; bk. 19, L. ed. 987; *Oelricks v. Ford*, 64 U. S. (23 How.) 49; bk. 16, L. ed. 451; *Salmon Falls Manf. Co. v. Goddard*, 55 U. S. (14 How.) 446; bk. 14, L. ed. 493. See, also, *Bailey v. Bensley*, 87 Ill. 556; *Harris v. Tumbidge*, 83 N. Y. 92; s. c. 38 Am. Rep. 398; *White v.*

Fuller, 67 Barb. (N. Y.) 267; *Hobart v. Littlefield*, 13 R. I. 341; *Swift v. Gifford*, 2 Low. C. C. 110; *Haskins v. Warren*, 115 Mass. 536; s. c. 18 Am. Rep. 463.

Varying express contract by custom.—Evidence of custom cannot be introduced to vary the express terms of a written contract. *Spears v. Ward*, 48 Ind. 541; *Brown v. Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; *Schenck v. Griffin*, 38 N. J. L. (9 Vr.) 462, 471; *Larrowe v. Lewis*, 44 Hun (N. Y.) 226. Thus, parol evidence is not admissible to show that a broker bought and sold note, in terms stating a contract of sale, was by usage a mere proposal which either might reject (*Bigelow v. Legg*, 102 N. Y. 652; s. c. 2 Cent. Rep. 877); and it is said that a clean bill of lading imports a contract to stow goods under the deck, and parol evidence cannot be admitted of a different agreement (*The Delaware*, 81 U. S. (14 Wall.) 579; bk. 20, L. ed. 779); however, see *Chalfant v. Williams*, 35 Pa. St. 212.

² 6 H. & N. 617; 30 L. J. Ex. 168; see also *Bissell v. Beard*, 28 L. T. N. S. 720.

³ Vol. I. 8th ed. p. 602 *et seq.*; and see *Johnson v. Raylton*, 7 Q. B. D. 438, C. A.

§ 240. After a contract has been proven by the production of a written note or memorandum sufficient to satisfy the statute, the question often arises as to the admissibility of parol proof of a subsequent agreement to change or annul it.

At common law it is competent to the parties at any time after an agreement (not under seal) has been reduced to writing and signed, to make a fresh parol agreement, either to waive the written bargain altogether, to dissolve and annul it, or to subtract from, vary, or qualify its terms, and thus to make a new contract, to be proven partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what is left of the written agreement.¹

¹ *Per* Denman C. J. in *Goss v. Lord Nugent*, 5 Barn. & Ad. 66.

American authorities.—*Rhodes v. Thomas*, 2 Ind. 638; *Willey v. Hall*, 8 Iowa, 62; *Wiggin v. Goodwin*, 63 Me. 389; *Haynes v. Fuller*, 40 Me. 162; *Richardson v. Cooper*, 25 Me. 450, 452; *Allen v. Sowerby*, 37 Md. 410; *Coates v. Sangston*, 5 Md. 121; *Franklin v. Long*, 7 Gill & J. (Md.) 407; *Goodrich v. Longley*, 70 Mass. (4 Gray) 383; *Munroe v. Perkins*, 55 Mass. (9 Pick.) 298; s. c. 20 Am. Dec. 475; *Cummings v. Arnold*, 44 Mass. (3 Metc.) 489; s. c. 37 Am. Dec. 155; *Richardson v. Hooper*, 30 Mass. (13 Pick.) 446; *Westchester Ins. Co. v. Earle*, 33 Mich. 143, 153; *Seaman v. O'Hara*, 29 Mich. 66; *Hewitt v. Brown*, 21 Minn. 163; *Miles v. Roberts*, 34 N. H. 245; *Cummings v. Putnam*, 19 N. H. 569; *Grafton Bank v. Woodward*, 5 N. H. 99; s. c. 20 Am. Dec. 566; *Musselman v. Stoner*, 31 Pa. St. 265; *Miller v. Fichthorn*, 31 Pa. St. 252; *McGrann v. North Lebanon R. Co.* 29 Pa. St. 82; *Vicary v. Moore*, 2 Watts (Pa.) 456, 457; s. c. 27 Am. Dec. 323; *Heatherly v. Record*, 12 Tex. 49; *Flanders v. Fay*, 40 Vt. 316; *Brown v. Everhard*, 62 Wis. 207; *Swain v. Seamens*, 76 U. S. (9 Wall.) 254, 271; bk. 19, L. ed. 554, 559; *Emerson v. Slater*, 63 U. S. (22 How.) 28, 41; bk. 16, L. ed. 218.

Parol evidence of subsequent agreement.—In cases not within the Statute of Frauds and which fall within the general rules of the common law, the parties to an agreement which is in writing may at any time before the breach of it by a new contract not in writing, modify, waive, dissolve, or annul the former agreement. *Swain v. Seamens*, 76 U. S. (9 Wall.) 254, 271; bk. 19, L. ed. 554, 559. See, also, *Carpenter v. Galloway*, 73 Ind. 418; *Kribs v. Jones*, 44 Md. 396; *Gault v. Brown*, 48 N. H. 183, 186; s. c. 2 Am. Rep. 210; *Schultz v. Bradley*, 27 N. Y. 646; *Hasbrouck v. Tappen*, 15 Johns. (N. Y.) 182, 200; *Steven v. Cooper*, 1 John. Ch. (N. Y.) 429; s. c. 7 Am. Dec. 499; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68; s. c. 24 Am. Dec. 121; *Musselman v. Stoner*, 31 Pa. St. 265, 269; *Espy v. Anderson*, 14 Pa. St. 308; *Vicary v. Moore*, 2 Watts (Pa.) 451, 457; s. c. 27 Am. Dec. 323; *Ladd v. King*, 1 R. I. 224; s. c. 51 Am. Dec. 624; *Dana v. Hancock*, 30 Vt. 616; *Cooper v. Cleghorn*, 50 Wis. 113; *Emerson v. Slater*, 63 U. S. (22 How.) 42; bk. 16, L. ed. 365; *Clarke v. Russel*, 3 U. S. (3 Dall.) 415; bk. 1, L. ed. 660; *Harvey v. Grabham*, 5 Ad. & E. 73; *Goss v. Nugent*, 5 Barn. & Ad. 64; *Emmet v. Dewhurst*, 3 Mac. & G. 587; *Browne on Statute of Frauds* (2d ed.)

But this principle of the common law is not applicable to a contract for the sale of goods under the Statute of Frauds. No verbal agreement to abandon it in part, or to add to, or omit, or modify any of its terms, is admissible.

Thus parol evidence is not admissible to change the place

sec. 409. But where the contract is within the Statute of Frauds it cannot be varied by any subsequent agreement of the parties, unless such new agreement is also in writing. *Swain v. Seamens*, 76 U. S. (9 Wall.) 254, 271; bk. 19, L. ed. 554, 559; *Hasbrouck v. Tappen*, 15 Johns. (N. Y.) 200; *Blood v. Goodrich*, 9 Wend. (N. Y.) 63; *Emerson v. Slater*, 63 U. S. (22 How.) 42; bk. 16, L. ed. 365; *Clarke v. Russel*, 3 U. S. (3 Dall.) 415; bk. 1, L. ed. 660; *Harvey v. Grabham*, 5 Ad. & Ell. 61; *Goss v. Nugent*, 5 Barn. & Ad. 58; *Stowell v. Robinson*, 3 Bing. N. C. 928; *Falmouth v. Thomas*, 5 C. & M. 109. In England it is now established that a new verbal contract cannot be substituted for the original contract, where, by the Statute of Frauds, such original contract must be in writing. *Tyers v. Rose-dale Iron Co.*, L. R. 8 Ex. 315; see, also, *Plevins v. Downing*, L. R. 1 C. P. Div. 220; *Hickman v. Haynes*, L. R. 10 C. P. 598. However a different doctrine prevails in some States of the Union. See *Richardson v. Cooper*, 25 Me. 450; *Blood v. Hardy*, 15 Me. 61; *Kribs v. Jones*, 44 Md. 396; *Franklin v. Long*, 7 Gill & J. (Md.) 409; *Reed v. Chambers*, 6 Gill & J. (Md.) 490; *Watkins v. Hodges*, 6 Harr. & J. (Md.) 38, 46; *Norton v. Simonds*, 124 Mass. 19; *Morse v. Copeland*, 68 Mass. (2 Gray) 302; *Stearns v. Hall*, 63 Mass. (9 Cush.) 31; *Cummings v. Arnold*, 44 Mass. (3 Metc.) 486; s. c. 37 Am. Dec. 155; *Gault v. Brown*, 48 N. H. 183, 196; s. c. 2 Am. Rep. 210; *Buel v. Miller*, 4 N. H. 196; *Long v. Hartwell*, 34 N. J. L. (5 Vr.) 127; *Reed v. McGrew*, 5 Ohio, 376; *Bever v.*

Butler, Wright (Ohio) 367; *Negley v. Jeffers*, 28 Ohio St. 100; *Raffensberger v. Cullison*, 28 Pa. St. 426; *Lawrence v. Dole*, 11 Vt. 549.

The Supreme Court of Ohio say in the case of *Thurston v. Ludwig*, 6 Ohio St. 1, 5, that "it appears to be well settled that subsequent to the execution of a written contract, it is competent for the parties by a new contract, although not in writing, either to abandon, waive or annul the prior contract, or vary or qualify the terms of it in any manner. And where the verbal contract only changes or modifies some of the terms of the original contract, it embraces by reference all the written stipulations of the original undertaking, and is to be proved by the verbal agreement taken in its connection with the written contract. But where a written contract is thus either totally abandoned and annulled, or simply altered or modified in some of its terms, it is done, and can only be done by a distinct and substantive contract between the parties founded on some valid consideration."

The Wisconsin Supreme Court say in *Marsh v. Bellew*, 45 Wis. 36, that where an oral extension of time for payment on a written contract has been given, either by parol or otherwise, and the purchaser has acted upon the faith of such extension or waiver, the courts have held the vendor bound by his contract. Every substituted agreement is virtually a new contract, and where it is oral it is within the statute, but is taken out by part performance. See *Ladd v. King*, 1 R. I. 224; s. c. 51 Am. Dec. 624; see, also, *Kribs v. Jones*, 44 Md. 396, 408; *Hicks v. Cleveland*, 48 N. Y. 84, 91.

of delivery fixed in the writing,² nor the time for the [*178] *delivery;³ nor to prove a partial waiver of a promise to furnish a good title;⁴ nor a modification of a stipulation for a valuation;⁵ nor a change in any of the terms; for the Courts can draw no distinctions between stipulations that are material and those that are not.⁶

§ 241. But where there was an executory contract for the building of a landaulet described in the agreement, parol evidence was admitted of alterations and additions ordered by the purchaser from time to time, Gaselee J. saying that “otherwise every building contract would be avoided by every addition.”¹

In *Brady v. Oastler*,² the action was for damages for breach of contract in not delivering certain goods within the time fixed by a written contract, and the plaintiff offered parol evidence to prove, as an element of consideration for the jury in estimating damages, that the price fixed in the contract was above the market price, and that he had assented to pay this extra price because of the short term allowed for delivery; but the evidence was rejected by Bramwell B., at Nisi Prius, and his ruling was approved by Pollock C. B. and Channell B.; a strong dissenting opinion, however, was delivered by Martin B.

§ 242. [Parol evidence to prove, not a substituted contract, but the assent of the defendant to a substituted mode of performing the original contract, *when that performance is completed*, is admissible.¹ Thus, in the *Leather Cloth Co. v.*

² *Moore v. Campbell*, 10 Ex. 323, and 23 L. J. Ex. 310; *Stowell v. Robinson*, 3 Bing. N. C. 928; *Marshall v. Lynn*, 6 M. & W. 109; *Stead v. Dawber*, 10 A. & E. 57.

³ *Noble v. Ward*, L. R. 1 Ex. 117; 35 L. J. Ex. 81.

⁴ *Goss v. Lord Nugent*, 5 B. & Ad. 65.

⁵ *Harvey v. Grabham*, 5 A. & E. 61.

⁶ *Per Parke B.*, in *Marshall v. Lynn*, 6 M. & W. 116. See, also, *Emmett v. Dewhurst*, 21 L. J. Ch. 497. The cases in the notes to this para-

graph overrule *Cuff v. Penn*, 1 M. & S. 21; *Warren v. Stagg*, cited in *Littler v. Holland*, 3 T. R. 591, and *Thresh v. Rake*, 1 Esp. 53; cf. *Sanderson v. Graves*, L. R. 10 Ex. 234, a case under the 4th section.

¹ *Hoadley v. M'Lain*, 10 Bing. 489; but see remarks of Bramwell B. upon this dictum, in *Sanderson v. Graves*, L. R. 10 Ex. at page 237.

² 3 H. & C. 112; 33 L. J. Ex. 300.

¹ *Subsequent performance*, where executed and accepted will be binding. *Courtenay v. Fuller*, 65 Me. 156;

Hieronimus,² the contract was for the sale of goods to be forwarded to the purchaser by Ostend, and the goods were afterwards forwarded by Rotterdam, and evidence was admitted to show that the defendant *by his conduct* had assented to the substituted mode of delivery. And so, although neither *party to the contract may avail himself of a parol agreement to vary or enlarge the *time* of performance, yet, if the seller has postponed delivery at the verbal request of the buyer, or the buyer has forborne to claim delivery at the verbal request of the seller, neither the seller in the former, nor the buyer in the latter case is precluded from afterwards suing on the original contract.

In *Ogle v. Earl Vane*,³ the defendant contracted to sell to the plaintiff 500 tons of iron, delivery to extend to the 25th of July, 1865. Owing to an accident to the defendant's furnaces he had delivered none of the iron *by that date*. Afterwards negotiations passed between the parties, but eventually, in February, 1866, the plaintiff went into the market. The price of iron had risen since July, and the plaintiff sought to recover from the defendant the difference between the contract and the market price in February. The defendant paid into Court the difference between the contract and the market price in July. The Judge at the trial left it to the jury to say whether on the evidence they sought that the defendant had held out that he should be able to deliver the iron, and that the plaintiff had waited accordingly, in which case they might return a verdict for damages beyond the amount paid into Court. The jury returned a verdict for the full amount claimed. Upon the argument of a rule to enter a verdict for the defendant, on

Allen v. Sowerby, 37 Md. 410; *Sovereign v. Ortmann*, 47 Mich. 181; *Miles v. Roberts*, 34 N. H. 245; *Long v. Hartwell*, 34 N. J. L. (5 Vr.) 116, 127; *McCombs v. McKennan*, 2 Watts. & S. (Pa.) 216; s. c. 37 Am. Dec. 505; *Malone v. Dougherty*, 79 Pa. St. 46; *Swain v. Seamens*, 76

U. S. (9 Wall.) 254; bk. 19, L. ed. 554.

² L. R. 10 Q. B. 140. See, also, *Long v. Hartwell*, 34 N. J. L. (5 Vr.) 127; *Neil v. Cheves*, 1 Bail. (S. C.) L. 537; *Swain v. Seamens*, 76 U. S. (9 Wall.) 254, 271; bk. 19, L. ed. 554.

³ L. R. 3 Q. B. 272, in Ex. Ch.; affirming s. c. L. R. 2 Q. B. 275.

the ground that there was no evidence to go to the jury of the plaintiff being entitled to more damages than were represented by the sum paid into Court, it was objected, on behalf of the defendant, that any agreement for postponement ought to have been in writing to satisfy the Statute of Frauds; but it was held by the Court of Queen's Bench, and affirmed by the Exchequer Chamber, first, that there was evidence from which the jury might infer that the plaintiff's delay in going into the market was at the defendant's request; and, secondly, that as the evidence went to show, not a new contract, *but simply a forbearance by the plaintiff at the request of the defendant*, the Statute of Frauds did not apply.

[*180] § 243. * The cases bearing upon this point are considered in the judgment of the Court of Common Pleas in *Hickman v. Haynes*.¹ The contract was for the sale by the plaintiff to the defendants of 100 tons of pig-iron by monthly deliveries of twenty-five tons, in March, April, May, and June, 1873. Seventy-five tons of iron were delivered during the months of March, April, and May respectively, in accordance with the contract, but early in June the defendants verbally requested the plaintiff, and the plaintiff consented to postpone delivery of the remaining twenty-five tons. Upon the expiration of the contract time the plaintiff tendered the residue of the iron, but the defendants then refused to accept it. In an action for damages for breach of contract the plaintiff was held entitled to succeed. It was contended, on behalf of the defendants, that a new agreement for the delivery and acceptance of the remaining twenty-five tons of iron had been substituted for the original written contract, and that this new agreement being verbal could not be enforced; but the Court held that the original contract still subsisted, and that the plaintiff could maintain an action upon it, that the assent to the defendant's request to give time was not a valid agreement binding the plaintiff, but a *voluntary forbearance* on his part; and the same distinction was drawn between a substitution of one agreement for another, and a voluntary forbearance to deliver at the

¹ L. R. 10 C. P. 598.

request of another, which had already been recognized in *Ogle v. Earl Vane*.

On the other hand, in *Plevins v. Downing*,² the plaintiffs contracted to deliver 100 tons of pig-iron, "25 tons at once, and 75 tons in July next." By the end of July the plaintiffs had delivered, and the defendant had accepted, 75 tons in all. There was no evidence that the defendant had requested the plaintiffs, *before the end of July*, to withhold delivery of the remaining 25 tons, but there was evidence that in *October* the defendant *verbally* requested the plaintiffs to forward 25 tons, which, when forwarded, he declined to accept. Held, that the plaintiffs could not sue on the original contract, inasmuch as they were unable to prove that they were ready and willing to deliver the 25 tons *at the end of July, and had only withheld [*181] delivery at the defendant's request, neither could they rely upon the request to deliver made to them by the defendant in October, as that would have been to substitute a parol for a written agreement.

"It is true," said Brett J. (at p. 225), in delivering the judgment of the Court, "that a distinction has been pointed out and recognized between an alteration of the original contract in such cases, and an arrangement as to the mode of performing it. If the parties have attempted to do the first by words only, the Court cannot give effect in favor of either to such attempt; if the parties make an arrangement as to the second, though such arrangement be only made by words, it can be enforced. The question is, what is the test in such an action as the present, whether the case is within the one rule or the other. Where the vendor, being ready to deliver within the agreed time, is shown to have withheld his offer to deliver till after the agreed time, in consequence of a request to him to do so, made by the vendee before the expiration of the agreed time, and where after the expiration of the agreed time, and within a reasonable time, the vendor proposes to deliver, and the vendee refuses to accept, the vendor can recover damages . . .

but if the alteration of the period of delivery were made at the request of the vendor, though such request were made during the agreed period for delivery, so that the vendor would be obliged if he sued for a non-acceptance of an offer to deliver after the agreed period, to rely upon the assent of the vendee to his request, *he could not aver and prove that he was ready and willing to deliver according to the terms of the original contract.* The statement shows that he was not. He would be driven to rely on the assent of the vendee to a substituted time of delivery, that is to say, to an altered contract or a new contract. This he cannot do, so as to enforce his claim. This seems to be the result of the cases which are summed up in *Hickman v. Haynes*."

In *Tyers v. The Rosedale Iron Co.*,³ the defendants were the sellers and the plaintiffs the purchasers of iron, [*182] *deliverable in monthly quantities over 1871. The defendants withheld delivery of various monthly quantities at the plaintiff's request. Afterwards, in December, 1871, *the last month* fixed in the contract for delivery, the plaintiffs demanded immediate delivery of the whole of the residue of the iron deliverable under the contract. The defendants refused to deliver any more than the monthly quantity for December. In an action by the plaintiffs for non-delivery, it was held by the Exchequer Chamber reversing the decision of the majority of the Court of Exchequer, that the defendants were not entitled to refuse to deliver more than the monthly quantity. It became unnecessary, in the Exchequer Chamber to decide whether the defendants were bound to deliver in December all that remained to be delivered under the contract, or whether they had a reasonable time within which to deliver, because the plaintiffs agreed to have the damages assessed at the market price of iron in December, and this arrangement, in a rising market, was more favorable to the defendants. The opinion of the Exchequer Chamber evidently was in favor of their having a reasonable time within which to deliver, but Martin B., in delivering a dissentient judgment in the Court of

³ L. R. 10 Ex. 195, Ex. Ch., reversing s. c. L. R. 8 Ex. 305.

Exchequer, which on the main point was upheld by the Exchequer Chamber, took the opposite view.

§ 244. The following propositions may fairly be deduced from the foregoing authorities where, in contracts for the delivery of goods by instalments, there have been applications for postponement of deliveries by seller or purchaser, and a subsequent tender of or request for delivery:—

(A.) Where the tender or request is *within the contract time*.

- (1) The defendant is bound to accept or deliver, although there has been postponement at the plaintiff's request. (*Tyers v. Rosedale Iron Co.*¹)
- (2) It has not yet been decided whether the defendant is bound to accept or deliver all the quantities within the contract time, or only within some reasonable time afterwards, though the latter appears to be the better opinion. (*Tyers v. Rosedale Iron Co.*¹)

*(B.) Where the tender or request is *after the contract time*. [*183]

- (1) If the postponement has taken place at the *defendant's* request, he is estopped from denying that the plaintiff was ready and willing to deliver or accept within the contract time. (*Ogle v. Earl Vane*,² *Hickman v. Haynes*.³)
- (2) If the postponement has taken place at the *plaintiff's* request, he cannot maintain his action *on the original contract*, because he cannot prove that he was ready and willing to deliver or accept pursuant to the contract. (*Plevins v. Downing*.⁴)
- (3) In the last case, if suing on a *substituted contract*, such contract must have been reduced to writing, in order to satisfy the Statute of Frauds. (*Plevins v. Downing*.⁴)

The contrary dictum of Martin B., in *Tyers v. Rosedale Iron Co.*⁵ must, it is submitted, be considered as overruled in *Plevins v. Downing*.^{4 6}

¹ L. R. 10 Ex. 196, in Ex. Ch., reversing s. c. L. R. 8 Ex. 305.

² L. R. 3 Q. B. 272, in Ex. Ch., affirming s. c. L. R. 2 Q. B. 275.

³ L. R. 10 C. P. 598.

⁴ 1 C. P. D. 220.

⁵ L. R. 8 Ex. at p. 319.

⁶ See interlocutory remarks of

Proof of approval, *after performance*, of a substituted mode of performance is a different thing from proof of a substituted contract, and may be given by parol. (*Leather Cloth Co. v. Hieronimus.*⁷)

§ 245. Whether or not parol evidence is admissible to show a subsequent agreement for a waiver and abandonment of the *whole* contract, proven by a written note or memorandum under the statute, has not been decided, and the *dicta* on the subject are uncertain and contradictory.¹ Where, however, the agreement to rescind the first contract forms part of or results from a new parol agreement which itself is invalid, and cannot be enforced under the statute, it is held that the new parol agreement cannot have the effect of rescinding the first bargain.²

[*184] * [It is a settled rule of equity that a contract required to be in writing to satisfy the statute may be rescinded by a parol agreement; and such rescission would be a sufficient defence to an action by either party for specific performance.³]

§ 246. Parol evidence may be offered to show that a signature to a note or memorandum, though made by A. in his own name, was really made in behalf of B., his principal, when the action is brought for the purpose of charging B.;¹

Brett and Grove JJ., 1 C. P. D. at p. 223.

⁷ See remarks of Blackburn J., L. R. 10 Q. B. at p. 146.

¹ *Dicta* of Lord Denman in *Goss v. Lord Nugent*, 5 B. & Ad. 65, and in *Harvey v. Grabham*, 5 A. & E. 61; of Sir Wm. Grant in *Price v. Dyer*, 17 Ves. 356; and of Lord Hardwicke in *Bell v. Howard*, 9 Mod. 305.

² *Moore v. Campbell*, 10 Ex. 323; and 23 L. J. Ex. 310; *Noble v. Ward*, L. R. 1 Ex. 117; L. R. 2 Ex. 135, in error; 35 L. J. Ex. 81.

³ See Fry on Specific Performance, 2d ed. 1881, p. 445.

Regarding admissions of oral evidence to vary or explain a written contract, see *ante*, 237, note 3. See, also,

Van Syckel v. Dalrymple, 32 N. J. Eq. (5 Stew.) 233; *Stevens v. Cooper*, 1 John. Ch. (N. Y.) 425; s. c. 7 Am. Dec. 499; *Phelps v. Seely*, 22 Gratt. (Va.) 573, 585; *Marsh v. Bellew*, 45 Wis. 36.

¹ *Trueman v. Loder*, 11 Ad. & E. 589. See, also, *Cothay v. Fennell*, 10 Barn. & Cress. 671; *Piggott v. Thompson*, 3 Bos. & P. 147; *Norfolk v. Worthy*, 1 Campb. 337; *Phelps v. Prothero*, 16 C. B. 370; *Hornby v. Lacy*, 6 M. & S. 166; *Bickerton v. Burrell*, 5 M. & S. 390, 391; *Morris v. Cleasby*, 1 M. & S. 576; s. c. 4 M. & S. 566; *Scrimshire v. Alderton*, Str. 1182.

American authorities. — *Alston v. Heartman*, 2 Ala. 699; *Ewing v.*

but it is not admissible in behalf of A. in such a contract, for the purpose of showing that he is not personally bound, and had acted only as agent of B.² Where the paper was

Medlock, 5 Port. (Ala.) 82; Potter v. Yale College, 8 Conn. 52, 60; Crawford v. Dean, 6 Blackf. (Ind.) 181; Harper v. Ragan, 2 Blackf. (Ind.) 39; Tharp v. Farquar, 6 B. Mon. (Ky.) 3; Pitts v. Mower, 18 Me. 361; s. c. 36 Am. Dec. 727; Edmond v. Caldwell, 15 Me. 340; Levant v. Parks, 10 Me. (1 Fairf.) 441; Titcomb v. Seaver, 4 Me. (4 Greenl.) 542; York County Bank v. Stein, 24 Md. 447, 463; Higdon v. Thomas, 1 H. & Gill. (Md.) 153; Pike v. Fay, 101 Mass. 134; Miller v. Stevens, 100 Mass. 518; s. c. 1 Am. Rep. 139; Stoops v. Smith, 100 Mass. 63; s. c. 1 Am. Rep. 85; Putnam v. Bond, 100 Mass. 68; Hurley v. Brown, 98 Mass. 645; Winchester v. Howard, 97 Mass. 303, 305; Hunter v. Giddings, 97 Mass. 41; Sanborn v. Flagler, 91 Mass. (9 Allen) 477; Lerner v. Johns, 91 Mass. (9 Allen) 419; Eastern R. R. Co. v. Benedict, 71 Mass. (5 Gray) 561; Fuller v. Hooper, 69 Mass. (3 Gray) 341; Williams v. Bacon, 68 Mass. (2 Gray) 387, 393; Huntington v. Knox, 61 Mass. (7 Cush.) 371, 374; Brown v. Brown, 49 Mass. (8 Metc.) 576; Commercial Bank v. French, 38 Mass. (21 Pick.) 486; Gilmore v. Pope, 5 Mass. 491; Van Staphorst v. Pearce, 4 Mass. 263; Briggs v. Munchon, 56 Mo. 467, 472; Chandler v. Coe, 54 N. H. 561; Briggs v. Partridge, 64 N. Y. 357, 362; s. c. 21 Am. Rep. 617; Dykers v. Townsend, 24 N. Y. 57; Leverick v. Meigs, 1 Cow. (N. Y.) 646; Hogan v. Shorb, 24 Wend. (N. Y.) 461; Saily v. Cleveland, 10 Wend. (N. Y.) 156; Golden v. Levy, 1 Law. Repos. (N. C.) 528; s. c. 6 Am. Dec. 555; Girard v. Taggart, 5 Serg. & R. (Pa.) 19; s. c. 9 Am. Dec. 327; Hubbert v. Borden, 6 Whart. (Pa.) 79; Lapham v. Green, 9 Vt. 407; Baldwin v. Bank of Newbury, 68 U. S. (1 Wall.) 234; bk. 17,

L. ed. 534; Salmon Falls Manuf. Co. v. Goddard, 55 U. S. (14 How.) 446, 456; bk. 14, L. ed. 493; Walter v. Ross, 2 Wash. C. C. 283; Story, Agency, § 161 and note, § 418 *et seq.*; Dunlap's Paley's Agency, and note 324; 1 Chitty Pl. and notes *358, *373; 2 Smith's Lead. Cas. 35.

Agency may be proved by parol on a suit, for the contract price of an article sold on a memorandum made by his agent, and show the fact of the agency by parol evidence; York County Bank v. Stein, 24 Md. 447, 464; Hunter v. Giddings, 97 Mass. 41; Sanderson v. Lamberton, 6 Bin. (Pa.) 129; Hubbert v. Borden, 6 Whart. (Pa.) 79, 92; Stowell v. Eldred, 39 Wis. 614; Ford v. Williams, 62 U. S. (21 How.) 287; bk. 16, L. ed. 36; Salmon Falls Manuf. Co. v. Goddard, 55 U. S. (14 How.) 446, 456; bk. 14, L. ed. 493; New Jersey Steam Nav. Co. v. Merchants' Bank, 47 U. S. (6 How.) 344, 381; bk. 12, L. ed. 465; but see Winchester v. Howard, 97 Mass. 303. "But parol evidence can never be admitted for the purpose of exonerating an agent who has entered into a written contract in which he appears as principal, even though he should propose to show, if allowed, that he disclosed the agency and mentioned the name of his principal at the time the contract was executed." Nash v. Towne, 72 U. S. (5 Wall.) 689, 703; bk. 18, L. ed. 527. See, also, Chandler v. Coe, 54 N. H. 561, 575; Babbett v. Young, 51 N. Y. 238, 242; Mills v. Hunt, 20 Wend. (N. Y.) 431, 434; Titus v. Kyle, 10 Ohio St. 444; Smith's Lead. Cas. 358, 373.

² Higgins v. Senior, 8 M. & W. 834; Cropper v. Cook, L. R. 3 C. P. 194; Fawkes v. Lamb, 31 L. J. Q. B. 98; Calder v. Dobell, L. R. 6 C. P. 486.

signed "D. M. & Co., Brokers," and purported to be a purchase by them for "our principals," not naming the principals, parol evidence was held admissible of a usage in such cases, that the brokers became personally liable.³ [So, in a later case, where the contract was expressed to be made and was signed by the defendants "as agents to merchants," parol evidence was admitted of a usage by which the agent became personally liable, if the principal's name was not disclosed within a reasonable time.⁴] And in *Wake v. Harrop*⁵ (not under Statute of Frauds), it was held, that parol evidence was admissible to show that by *mistake* the written contract described the agent as principal, contrary to express agreement between the parties.

§ 247. We may now proceed to the examination of this clause of the statute, dividing the inquiry into two sections:—

1. What is a note or memorandum in writing?
2. When is it a sufficient note of the bargain made?

[*185] * *Section I.*—WHAT IS A NOTE OR MEMORANDUM IN WRITING?

§ 248. It may be premised that the note or memorandum must be one made and signed before the action brought. To satisfy the statute, there must be a *good contract* in existence at the time of action brought.¹

§ 249. But the statute does not require that the whole of the terms of the contract should be agreed to at one time,

³ *Humfrey v. Dale*, 7 E. & B. 266; and 26 L. J. Q. B. 137; E. B. & E. 1004; 27 L. J. Q. B. 390; *Mollett v. Robinson*, L. R. 7 H. L. 802, reversing L. R. 5 C. P. 646; L. R. 7 C. P. 84; *Fleet v. Murton*, L. R. 7 Q. B. 126; *Southwell v. Bowditch*, 1 C. P. D. 374, C. A., reversing *ibid.* 100; see, also, 2 Sm. L. C. 8th ed. p. 377, for the authorities on this subject; and see *post*, p. 201. See *Southwell v. Bowditch*, 1 C. P. Div. 100, 374; *Gadd v. Houghton*, 1 Ex. D. 357.

⁴ *Hutchinson v. Tatham*, L. R. 8 C. B. 482. See, also, *Hancock v. Fairfield*, 30 Me. 299; *Huntington v. Knox*, 61 Mass. (7 Cush.) 371, 374; *Williams v. Christie*, 4 Duer (N. Y.) 29; *Chappell v. Dann*, 21 Barb. (N. Y.) 17.

⁵ 6 H. & N. 768; 1 H. & C. 202; 30 L. J. Ex. 273; 31 L. J. Ex. 451.

¹ *Bill v. Bament*, 9 M. & W. 36. See remarks of Willes J., in *Gibson v. Holland*, L. R. 1 C. P. 1; 35 L. J. C. P. 5.

nor that they should be written down at one time, nor on one piece of paper; and accordingly it is settled, that where the memorandum of the bargain between the parties is contained in separate pieces of paper, and where these papers contain the *whole* bargain, they form together such a memorandum as will satisfy the statute, provided the contents of the *signed* paper make such reference to the other written paper or papers, as to enable the Court to construe the whole of them together as constituting all the terms of the bargain.¹ And

¹ *What is sufficient note or memorandum.*—The memorandum required by the statute must contain all the essential terms of the contract, expressed with such degree of certainty as to render it unnecessary to resort to parol evidence to determine the intention of the parties thereto. *Hagan v. Domestic Sewing Machine Co.*, 9 Hun (N. Y.) 74; *Grafton v. Cummings*, 99 U. S. (9 Otto) 110; bk. 25, L. ed. 366. See *Ellison v. Jackson Water Co.*, 12 Cal. 542; *Edelen v. Gough*, 5 Gill (Md.) 103; *Elliot v. Giese*, 7 Harr. & J. (Md.) 457; *Nichols v. Allen*, 23 Minn. 542; *Underwood v. Campbell*, 14 N. H. 393; *Laing v. Lee*, 20 N. J. L. (1 Spen.) 337; *Mallory v. Gillett*, 21 N. Y. 412; *Bennett v. Pratt*, 4 Den. (N. Y.) 275; *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 29; s. c. 5 Am. Dec. 317; *Sears v. Brink*, 3 Johns. (N. Y.) 210; s. c. 3 Am. Dec. 475; *Rogers v. Kneeland*, 13 Wend. (N. Y.) 114; *Peltier v. Collins*, 3 Wend. (N. Y.) 459; s. c. 20 Am. Dec. 711; *Soles v. Hickman*, 20 Pa. St. 180; *Taylor v. Pratt*, 3 Wis. 674; *Jenkins v. Reynolds*, 3 Brod. & B. 14; s. c. 6 J. B. Moore, 86; *Saunders v. Wakefield*, 4 Barn. & Ald. 595; *Newbury v. Armstrong*, 6 Bing. 201; *Lees v. Whitcomb*, 5 Bing. 34; *Morley v. Boothbay*, 3 Bing. 107; *Champion v. Plummer*, 4 Bos. & Pul. (1 N. R.) 252; *Stapp v. Lill*, 1 Campb. 242; s. c. 9 East, 348; *Cole v. Dyer*, 1 Crompt. & Jerv. 461; *Egerton v. Mathews*, 6 East, 308; *Wain v. War-*

ters, 5 East, 10; *Powers v. Fowler*, 4 Ell. & Bl. 511; *Wheeler v. Collier*, 1 Moody & M. 123; *Bainbridge v. Wade*, 16 Q. B. 89. However, the English and New York doctrine has been rejected in Connecticut and elsewhere. See *Sage v. Wilcox*, 6 Conn. 81; *Hargroves v. Cooke*, 15 Ga. 321; *Patmor v. Haggard*, 78 Ill. 607; *Mills v. Ross*, 44 Ind. 1; *Williams v. Robinson*, 73 Me. 186; *Gilligan v. Boardman*, 29 Me. 79; *Little v. Nabb*, 10 Mo. 3; *Reed v. Evans*, 17 Ohio, 128; *Adkins v. Watson*, 12 Tex. 199; *Gregory v. Glead*, 33 Vt. 405; *Patchin v. Swift*, 21 Vt. 292. The memorandum need not go into details of all the particulars of the contract; if it contains the substance, that will be sufficient. *McConnell v. Brillhart*, 17 Ill. 354; *Chase v. Lowell*, 73 Mass. (7 Gray) 33; *Hawkins v. Chase*, 36 Mass. (19 Pick.) 502; *Ives v. Hazard*, 4 R. I. 14; *Salmon Falls Manuf. Co. v. Goddard*, 55 U. S. (14 How.) 456; bk. 14, L. ed. 493; *Sarl v. Bourdillon*, 1 C. B. (N. S.) 188. But it must contain the names of the contracting parties (*Nichols v. Johnson*, 10 Conn. 192; *Sanborn v. Sanborn*, 73 Mass. (7 Gray) 142; *Webster v. Ela*, 5 N. H. 540; *Sherburne v. Shaw*, 1 N. H. 157; *Barry v. Law*, 1 Cranch C. C. 77; *Graham v. Musson*, 5 Bing. (N. C.) 607; s. c. 7 Scott, 769, 776; *Champion v. Plummer*, 4 Bos. & Pul. (1 N. R.) 252; *Sarl v. Bourdillon*, 1 C. B. N. S. 188; *Bateman v. Phillips*, 15 East, 272);

the same result will follow if the other papers were attached or fastened to the signed paper *at the time of the signature*.

and show which the seller and which the buyer. *Osborn v. Phelps*, 19 Conn. 73; *Nichols v. Johnson*, 10 Conn. 198; *Bailey v. Ogden*, 3 Johns. (N. Y.) 399; *Salmon Falls Manuf. Co. v. Goddard*, 55 U. S. (14 How.) 446; bk. 14, L. ed. 493. It must either expressly or by reference state the contract and describe the subject-matter with reasonable certainty. *Nichols v. Johnson*, 10 Conn. 192; *Kay v. Curd*, 6 B. Mon. (Ky.) 100; *O'Donnell v. Leeman*, 43 Me. 158; s. c. 69 Am. Dec. 54; *Waterman v. Meigs*, 58 Mass. (4 Cush.) 497; *Morton v. Dean*, 54 Mass. (13 Metc.) 885; *Hawkins v. Chace*, 36 Mass. (19 Pick.) 502; *Bailey v. Ogden*, 3 Johns. (N. Y.) 399; s. c. 3 Am. Dec. 509; *Tallman v. Franklin*, 14 N. Y. 584; *Salmon Falls Manuf. Co. v. Goddard*, 55 U. S. (14 How.) 446; bk. 14, L. ed. 493; *DeBeil v. Thomson*, 3 Beav. 469; *Sarl v. Bourdillon*, 1 C. B. N. S. 188; *Chitt. on Contr.* 70, 71, 412; *Story on Sales*, § 257. Where the price is agreed on, it must be stated.

The memorandum will be sufficient where it shows that there was a consideration, and what it was. *Hawkins v. Chace*, 36 Mass. (19 Pick.) 502; *Laing v. Lee*, 20 N. J. L. (1 Spen.) 337; *Cooper v. Dedrick*, 22 Barb. (N. Y.) 516; *Waterbury v. Graham*, 4 Sandf. (N. Y.) 215; *Douglass v. Howland*, 24 Wend. (N. Y.) 35; *Watson v. McLaren*, 19 Wend. (N. Y.) 557; *Marquand v. Hipper*, 12 Wend. (N. Y.) 520; *Day v. Elmore*, 4 Wis. 190; *Newbury v. Armstrong*, 6 Bing. 201; *Jarvis v. Wilkins*, 7 Mees. & W. 410; *Bainbridge v. Wade*, 16 Q. B. 89; s. c. 1 Eng. L. & E. 236; *Hoadly v. McLaine*, 10 Bing. 482; *Acebal v. Levy*, 10 Bing. 382; *Valpy v. Gibson*, 4 C. B. 837, 864. See, also, *Adams v. McMillan*, 7 Port. (Ala.) 73; *Kay v. Curd*, 6 B. Mon. (Ky.) 103; *Waul v. Kirkman*, 27

Miss. 823; *Soles v. Hickman*, 20 Pa. St. 180; *Buck v. Pickwell*, 27 Vt. 167; *Idle v. Stanton*, 15 Vt. 691; *Smith v. Arnold*, 5 Mason C. C. 414; *Elmore v. Kingscote*, 5 Barn. & Cres. 583; *Hoadly v. McLaine*, 10 Bing. 482; *Acebal v. Levy*, 10 Bing. 376; *Story on Sales*, sec. 222.

Where credit is given the terms must be stated, if agreed on, and if the time of performance is settled, this, also, should be contained in the memorandum. *O'Donnell v. Leeman*, 43 Me. 158; s. c. 69 Am. Dec. 54; *Davis v. Shielas*, 26 Wend. (N. Y.) 341; *Salmon Falls Manuf. Co. v. Goddard*, 55 U. S. (14 How.) 446; bk. 14, L. ed. 493.

Consideration.—According to the English doctrine the consideration must be in writing, and this doctrine prevails in Georgia, Maryland, New Hampshire, New York, and South Carolina. *Henderson v. Johnson*, 6 Ga. 390; *Hutton v. Padgett*, 26 Md. 228; *Edelen v. Gough*, 5 Gill. (Md.) 103; *Elliot v. Giese*, 7 Harr. & J. (Md.) 457; *Neelson v. Sanborne*, 2 N. H. 414; *Bennett v. Pratt*, 4 Den. (N. Y.) 275; *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 29; s. c. 5 Am. Dec. 317; *Sears v. Brink*, 3 Johns. (N. Y.) 210; s. c. 3 Am. Dec. 475; *Stephens v. Winn*, 2 Nott. & McC. (S. C.) 372. However, under the Virginia statute the consideration need not be in writing. *Wren v. Pearce*, 4 Smed. & M. (Miss.) 91; *Taylor v. Ross*, 3 Yerg. (Tenn.) 330; *Gilman v. Kibler*, 5 Humph. (Tenn.) 19; *Violett v. Patton*, 9 U. S. (5 Cr.) 142; bk. 3, L. ed. 61. The rule in Maine, Massachusetts, and New Jersey is the same. *Sage v. Wilcox*, 6 Conn. 81; *Hargroves v. Cooke*, 15 Ga. 321; *Gillighan v. Boardman*, 29 Me. 79; *Levy v. Merrill*, 4 Me. (4 Greenl.) 180; *Packard v. Richardson*, 17 Mass. 122; s. c. 9 Am. Dec. 123; *Buckley v. Bardslee*, 5 N. J. L. (2

But if it be necessary to adduce parol evidence, in order to connect a signed paper with others unsigned, by reason of the

South.) 570; s. c. 8 Am. Dec. 620; Reed v. Evans, 17 Ohio, 128; Adkins v. Watson, 12 Tex. 199; Miller v. Irvine, 1 Dev. & Bat. (S. C.) 103; Tufts v. Tufts, 3 Woodb. & M. C. C. 456. See, also, Henderson v. Johnston, 6 Ga. 390; Edelen v. Gough, 5 Gill (Md.) 103; Wyman v. Gray, 7 Harr. & J. (Md.) 409; Miller v. Cook, 23 N. Y. 496; Staats v. Howlett, 4 Den. (N. Y.) 559; Bennett v. Pratt, 4 Den. (N. Y.) 275; Bailey v. Freeman, 11 Johns. (N. Y.) 221; s. c. 6 Am. Dec. 371; Sears v. Brink, 3 Johns. (N. Y.) 210; s. c. 3 Am. Dec. 475; Packer v. Willson, 15 Wend. (N. Y.) 343.

Form of memorandum.—A formal written agreement is not necessary; if there is such a writing as imports a contract of sale, signed by the party to be charged, it is sufficient. *Salmon Falls Manuf. Co. v. Goddard*, 55 U. S. (14 How.) 446; bk. 14, L. ed. 493; s. c. 20 Curtis, 276; *Wilkinson v. Evans*, L. R. 1 C. P. 407; *Gibson v. Holland*, L. R. 1 C. P. 1; *Buxton v. Rust*, L. R. 7 Ex. 1; *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140; s. c. 12 Moak Eng. Rep. 211; *Kenworthy v. Schofield*, 2 Barn. & Cres. 945; *Jackson v. Lowe*, 1 Bing. 9; *Saunderson v. Jackson*, 2 Bos. & Pul. 238; *Hinde v. Whitehouse*, 7 East, 558; *Johnson v. Dodgson*, 2 Mees. & W. 653; *Allen v. Bennet*, 3 Taunt. 169.

The memorandum may be in the shape of a letter (see *Wood on Fraud*, sec. 347); a telegram (*Trevor v. Wood*, 36 N. Y. 307); an acknowledgment of invoice or bill of parcels signed. *Wilkinson v. Evans*, L. R. 1 C. P. 407; *Buxton v. Rust*, L. R. 7 Ex. 1, 270; s. c. 2 Moak Eng. Rep. 675; 1 Moak Eng. Rep. 135; *Saunderson v. Jackson*, 2 Bos. & Pul. 238; *McLean v. Nicoll*, 7 Jur. N. S. 999; *Langdell Cas. on Sales*, 528, 487, 340. However, it has been held that a bill

of parcels is not an agreement, and receipt and payment of such bill will not estop the buyer from proving an oral warranty and recovering for its breach. *Atwater v. Clancy*, 107 Mass. 369, 375.

The memorandum may consist of several writings on different slips of paper, made at different times, provided they have a consistent purpose in evincing a concluded bargain. *North v. Mendel*, 73 Ga. 400; s. c. 54 Am. Rep. 879, 881; *Smith v. Jones*, 66 Ga. 339; s. c. 42 Am. Rep. 72; *Ridgway v. Ingram*, 50 Ind. 148; *Lee v. Mahoney*, 9 Iowa, 344; *Freeport v. Bartol*, 3 Me. (3 Greenl.) 340; *Drury v. Young*, 58 Md. 546; s. c. 42 Am. Rep. 343; *Frank v. Miller*, 38 Md. 461; *Moaler v. Buchanan*, 11 Gill & J. (Md.) 322; *Rhoades v. Castner*, 94 Mass. (12 Allen) 132; *Lerned v. Wannemacher*, 91 Mass. (9 Allen) 412; *Morton v. Dean*, 54 Mass. (13 Metc.) 388; *Fisher v. Kuhn*, 54 Miss. 480; *Jelks v. Barrett*, 52 Miss. 315; *Brown v. Whipple*, 58 N. H. 229; *Johnson v. Buck*, 35 N. J. L. (6 Vr.) 339, 344; s. c. 10 Am. Rep. 243; *Peck v. Vandemark*, 99 N. Y. 29; *Tallman v. Franklin*, 14 N. Y. 584; *Doughty v. Manhattan Brass Co.*, 101 N. Y. 644; s. c. 4 N. E. Rep. 747; 2 Cent. Rep. 397; *Thayer v. Luce*, 22 Ohio St. 62; *Ide v. Stanton*, 15 Vt. 685; *Beckwith v. Talbot*, 95 U. S. (5 Otto) 289; bk. 24, L. ed. 496; *Peck v. North Staffordshire R. R. Co.*, 10 H. L. 472; *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Caton v. Caton*, L. R. 2 H. L. App. Cas. 127; *Cave v. Hastings*, L. R. 7 Q. B. Div. 125; s. c. 36 Moak Eng. Rep. 275; *Hinde v. Whitehouse*, 7 East, 558; *McLean v. Nicoll*, 7 Jur. N. S. 999; *Schneider v. Norris*, 2 Maule & S. 286; *Bill v. Bament*, 9 Mees. & W. 36; *Browne on Statute of Frauds*, secs. 350, 353; *Long. Cas. on Sales*, 1032, 1033, 599,

absence of any internal evidence in the contents of the signed paper to show a reference to, or connection with, the unsigned papers, then the several papers taken together do not constitute a memorandum *in writing* of the bargain so as to satisfy the statute,² *ante*, p. 174.

437, 362, 161, 102; Story on Sales, sec. 272; Wood on Frauds, sec. 364; 2 Schouler on Pers. Prop. sec. 486. But where the memorandum consists of separate pieces of paper, they must all be signed by the party to be charged, or by his duly authorized agent, or those pieces which he has not signed must be so connected either physically or by reference with one that has. Langdell's Sel. Cas. on Sales, 1032.

It is not necessary that the writing should have been intended as such by the party at the time (*Ellis v. Deadman*, 4 Bibb (Ky.) 467; Justice v. Lang, 42 N. Y. 493; s. c. 1 Am. Rep. 576; *Smith v. Surman*, 9 Barn. & C. 561; *Richards v. Porter*, 6 Barn. & C. 437; *Bailey v. Sweeting*, 9 C. B. N. S. 843; *Wilkinson v. Evans*, L. R. 1 C. P. 407; *Buxton v. Rust*, L. R. 7 Ex. 1, 279; s. c. 1 Moak Eng. Rep. 136; 2 Moak Eng. Rep. 675; *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140; s. c. 12 Moak Eng. Rep. 211; Lang. Cas. on Sales, 480, 528, 383, 54; Story on Sales, sec. 272a; Wood on Frauds, sec. 360), because it is simply evidence of, and does not go to make the contract (see *Townsend v. Hargraves*, 118 Mass. 325, 336; *Tufts v. Plymouth Gold Mining Co.*, 96 Mass. (14 Allen) 407; *Argus Co. v. Albany*, 55 N. Y. 495; *Gibson v. Holland*, L. R. 1 C. P. 1; *Buxton v. Rust*, L. R. 7 Ex. 1, 279; *Allen v. Bennet*, 3 Taunt. 169); neither need it be actually addressed to the plaintiff. *Drury v. Young*, 58 Md. 546; s. c. 42 Am. Rep. 343; *Townsend v. Hargraves*, 118 Mass. 335; *Peabody v. Speyers*, 56 N. Y. 230; *Argus Co. v. Albany*, 55 N. Y. 495; s. c. 14 Am. Rep. 296; *Johnson v. Dodgson*, 2 Mees. & W.

658; *Gibson v. Holland*, L. R. 1 C. P. 1; Lang. Cas. on Sales, 513, 413; 2 Schouler on Pers. Prop. secs. 485, 489; Sugden on Vendors and Purchasers (14th Eng. ed.) 189, sec. 39; Wood on Frauds, sec. 347.

An entry in the defendants' books not signed by any one is not a sufficient note in writing. *Barry v. Law*, 1 Cr. C. C. 77.

An auctioneer's memorandum or entry in his sale books is not a sufficient memorandum, particularly when it does not sufficiently describe the property sold and the terms of sale.

¹ *Smith v. Jones*, 66 Ga. 338; s. c. 42 Am. Rep. 72; *Ridgway v. Ingram*, 50 Ind. 145; s. c. 19 Am. Rep. 706; *Williams v. Threlkeld*, 2 Cr. C. C. 307; *Peirce v. Corf*, L. R. 9 Q. B. 210.

² When memorandum to be signed. — The memorandum of the agreement must be signed before suit is brought (*Phillips v. Ocmulgee Mills*, 55 Ga. 633, 636; *Bird v. Munroe*, 66 Me. 337, 347; *Townsend v. Hargraves*, 118 Mass. 325, 336; *Philbrook v. Belknap*, 6 Vt. 383; *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140); because there is no actionable contract before the memorandum is obtained, and the contract cannot be sued upon until it has been legally verified by writing. Until the agreement is reduced to writing there is no cause of action, although there is a contract; because the writing is a condition precedent to the right to sue. *Bird v. Munroe*, 66 Me. 337, 347.

It is not necessary that the memorandum pass by the parties, or be addressed to the purchaser or his agent, in order to be binding. *Williams v. Bacon*, 68 Mass. (2 Gray) 387; *Morton v. Dean*, 54 Mass. (13 Metc.) 385,

§ 250. [But where the reference contained in the signed paper is ambiguous, parol evidence will be admitted to explain the ambiguity and identify the document to which the signed paper must and does refer. Thus, parol evidence was held admissible to identify the documents which were respectively referred to by the following ambiguous expressions: * "instructions,"¹ "terms agreed upon,"² [*186] "purchase,"³ "our arrangement,"⁴ "purchased."⁵ It is submitted, therefore, that since the decision in *Baumann v. James*, the principle of which case has been adopted in the most recent cases illustrating this subject, and cited in the notes *infra*, the rule as laid down by the earlier authorities must be taken to have been enlarged to the following extent: it is no longer necessary for the signed paper to refer to any unsigned paper as such; it is sufficient to show that a particular unsigned paper and nothing else can be referred to, and parol evidence is admissible for this purpose. In *Long v. Miller*,⁶ where the same principle was carried even still further than in *Baumann v. James*, Thesiger L. J., on the question of the admissibility of parol evidence in these cases, says (at p. 456): "When it is proposed to prove the existence of a contract by several documents, it must appear upon the face of the instrument, signed by the party to be charged, that reference is made to another document, and this omission cannot be supplied by verbal evidence. If, however, it appears from the instrument itself that another document is referred to, that document may be identified by verbal evidence. A simple illustration of this rule is given in *Ridgway v. Wharton*; there 'instructions' were referred to: now instructions may be either written or verbal; but it was held that parol evi-

388; *Davis v. Shields*, 26 Wend. (N. Y.) 341; *Soles v. Hickman*, 20 Pa. St. 180; *Buck v. Pickwell*, 27 Vt. 167; *Elfe v. Gadsden*, 2 Rich. (S. C.) L. 373; *Salmon Falls Co. v. Goddard*, 55 U. S. (14 How.) 446, 455; bk. 14, L. ed. 498. See *Rhoades v. Castner*, 94 Mass. (12 Allen) 130; *Lerned v. Wanemacher*, 91 Mass. (9 Allen) 412; *Johnson v. Buck*, 35 N. J. L. (9 Vr.) 338, 344, 345; s. c. 10 Am. Rep. 243;

Phippen v. Hyland, 19 Up. Can. C. P. 416.

¹ *Ridgway v. Wharton*, 6 H. L. C. 238.

² *Baumann v. James*, 3 Ch. 508.

³ *Long v. Millar*, 4 C. P. D. 450, C. A.

⁴ *Cave v. Hastings*, 7 Q. B. D. 125.

⁵ *Shardlow v. Cotterell*, 18 Ch. D. 280; s. c. 20 Ch. D. 90, C. A.

⁶ 4 C. P. D. 450.

dence might be adduced to show that certain instructions in writing were intended. This rule of interpretation is merely a particular application of the doctrine as to latent ambiguity.”]

§ 251. Further, in order to satisfy the statute, when the memorandum relied on consists of separate papers, which it is attempted to connect by showing from their contents that they refer to the same agreement, these separate papers must be consistent and not contradictory in their statement of the terms, for otherwise it would be impossible to [*187] *determine what the bargain was, without the introduction of parol testimony to show which of the papers stated it correctly.¹

§ 252. The authorities are believed to be quite consistent in maintaining these principles. In citing them, it will be observed, that some of the cases were under the 4th section of the statute, the language of which is, on this subject, almost identical with that of the 17th. The two clauses are here placed in juxtaposition for comparison.

Fourth section.—“Unless the *agreement* on which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the *party* to be charged therewith, or some other person thereunto by him lawfully authorized.”

Seventeenth section.—“Except that some note or memorandum in writing of the said *bargain* be made, and signed by the *parties* to be charged with such contract, or their agents thereunto lawfully authorized.”

It will be noticed hereafter that the question, whether there is any distinction in meaning between the respective words quoted in italics, viz., “*agreement*” and “*bargain*,” on the one hand, and “*party*” and “*parties*,” on the other hand, has been mooted on several occasions.

¹ *Memorandum on separate papers.*—Where the note or memorandum is on separate pieces of paper, they must be consistent. *Jenness v. Mount Hope Iron Co.*, 53 Me. 20;

Calkins v. Falk, 1 Abb. App. Dec. (N. Y.) 291; *Phippen v. Hyland*, 19 Up. Can. C. P. 416. See *ante*, § 248, note (1).

§ 253. The leading case in which it was held that the intention of the signer to connect two written papers, not physically joined, and not containing internal evidence of his purpose to connect them, could not be proven by parol, occurred early in the present century.

Hinde v. Whitehouse,¹ in 1806, was the case of a sale by auction. The auctioneer, who, as will be shown hereafter (*post*, Ch. VIII.), is by law an agent authorized to sign for both parties, had a catalogue, headed "To be sold by auction, for particulars apply to Thomas Hinde," and wrote down opposite to the several lots on the catalogue the name of the purchaser. The auctioneer also had a separate paper containing the terms and conditions of the sale, which he read, and placed on his desk. The catalogue contained no reference to the conditions. Held, that the signature to *the catalogue was not sufficient to satisfy the statute, [*188] on the ground that it did not contain the terms of the bargain, nor refer to the other writing containing those terms.

Kenworthy v. Schofield,² in the King's Bench in 1824, was decided in the same way, on circumstances precisely the same. Lord Westbury recently stated the general principle, in a case which arose under a similar clause in the Railway and Canal Traffic Act, in these words, "In order to embody in the letter any other document or memorandum, or instrument in writing, so as to make it part of a special contract contained in that letter, the letter must either set out the writing referred to, or so clearly and definitely refer to the writing, that by force of the reference, the writing itself becomes part of the instrument it refers to."³ [Which refers to it?]

§ 254. The first reported case decided in banc, in which a signed paper referring to another writing was deemed sufficient to satisfy the statute, was that of *Saunderson v. Jack-*

¹ 7 East, 558; and see *Peirce v. 569. Johnson v. Buck*, 35 N. J. L. Corf, L. R. 9 Q. B. 210, *post*, p. 191. (6 Vr.) 338, 345; s. c. 10 Am. Rep.

² 2 B. & C. 945.

243. See on this point, *Peirce v.*

³ *Peek v. North Staffordshire* Corf, L. R. 9 Q. B. 210.
Railway Company, 10 H. L. C. 472-

son,¹ in 1800; but the case does not state how this connection between the two papers was made apparent, and can, therefore, give little aid in construing the clause of the statute, although it has been constantly quoted as authority for the general proposition, that the memorandum may be made up of different pieces of paper.

In *Allen v. Bennett*,² decided in 1810, the agent of the defendant sold rice to the plaintiff, and entered all the terms of the bargain on the plaintiff's book, but did not mention the plaintiff's name. Subsequently, the defendant wrote to his agent, mentioning the plaintiff's name, and authorizing his agent to give credit according to the memorandum in the plaintiff's book, saying, also, that to prevent dispute he sent a "sample of the rice." *Held*, that the letter referred to the memorandum of the bargain sufficiently to render the two together a signed note of the bargain.

§ 255. In 1812, *Cooper v. Smith*¹ was distinguished from the *foregoing case, because the letter offered to prove the contract, as entered on the plaintiff's books, falsified instead of confirming the entry, by stating that the bargain was for delivery within a specified time, a fact denied by the plaintiff. Le Blanc J., tersely said, "The letter of the defendant referred to a different contract from that proved on the part of the plaintiff, which puts him out of Court, instead of being a recognition of the same contract, as in the former case."²

In *Jackson v. Lowe and Lynam*,³ the Common Pleas, in 1822, held it perfectly clear that a contract for the sale of flour was fully proven within the statute by two letters, the first from the plaintiff to the defendants, reciting the contract, and complaining of the defendants' default in not delivering flour of proper quality, and the second from the

¹ 2 B. & P. 238.

² 3 Taunt. 169. See, also, *Townsend v. Hargraves*, 118 Mass. 325, 336.

³ 15 East, 103.

² See *Haughton v. Morton*, 5 Ir. C. L. Rep. 329, where also it is stated by Crampton, J., at p. 342, that since the case of *Jackson v. Lowe*, *supra*, it

is for the jury, in case of dispute, to decide whether the signed does or does not refer to the unsigned document. And see on this *M'Mullen v. Helberg*, 4 L. R. Ir. 94, at p. 104. See also *M'Mullen v. Helberg*, 4 L. R. Ir. 94, 104.

³ 1 Bing. 9.

defendants' attorney in reply to it, saying that the defendants had "performed their contract as far as it has gone, and are ready to complete the remainder," and threatening action if "the flour" was not paid for within a month.

§ 256. *Richards v. Porter*¹ was decided in the King's Bench in 1827, and on the face of the report it is almost impossible to reconcile it with the other decisions on this point. The facts were, that the plaintiff sent to the defendant, by order of the latter, from Worcester to Derby, on the 25th of January, 1826, five pockets of hops, which were delivered to the carriers on that day, and an invoice was forwarded containing the names of the plaintiff as buyer and of the defendant as seller. The defendant was also informed that the hops had been forwarded by the carriers.

A month later, on the 27th of February, the defendant wrote to the plaintiff: "The hops (five pockets) which I bought of Mr. Richards on the 23d of last month are not yet arrived, nor have I ever heard of them. I *received the invoice*. The last was much longer than they ought to have been on the road. However, if they do not arrive in a few days, I *must get some elsewhere, and [*190] consequently cannot accept them." The plaintiff was nonsuited, and the King's Bench held the nonsuit right, Lord Tenterden saying: "I think this letter is not a sufficient note or memorandum in writing of the contract to satisfy the Statute of Frauds. Even connecting it with the invoice, it is imperfect. If we were to decide that this was a sufficient note in writing, we should in effect hold that if a man were to write and say, 'I have received your invoice, but I insist upon it the hops have not been sent in time,' that would be a memorandum in writing of the contract sufficient to satisfy the statute." The facts as reported certainly are not the same as those used in illustration by Lord Tenterden. No doubt, if the defendant had said, "Our bargain was that you should *send* the hops in time, and you delayed beyond the time agreed on," there would have been no proof of the contract in writing as alleged by the plain-

¹ 6 B. & C. 437.

tiff. But the report shows that the goods were delivered in due time to the carrier, which, in contemplation of law, was a delivery to the purchaser, and the complaint was not that the goods had not been *sent* in time, but that they did not *arrive* in time; that a previous purchase also was delayed "on the road." The dispute, therefore, does not seem to have turned in the least on the *terms* of the bargain, which were completely proven by the letter and invoice together, but on the *execution* of it. In the recent case of *Wilkinson v. Evans*,² the judgment in *Richards v. Porter* is said to be reconcilable with the current of decisions by Erle C. J., on the ground "that the letter stated that the contract contained a term, not stated in the invoice; that the term was that the goods should be delivered within a given time." It is difficult to find in the letter, as quoted in the report, the statement said by the learned Chief Justice to be contained in it. The decision in *Richards v. Porter* seems to be reconcilable with settled principles only on the assumption that there was some proof in the case that the carrier was by special agreement the agent of the vendor, not of the vendee.³

[*191] * § 257. The case of *Smith v. Surman*¹ followed in the King's Bench, in 1829. The written memorandum was contained in two letters, one from the vendor's attorney, who wrote to ask for payment "for the ash timber which you purchased of him. . . . The value, at 1*s.* 6*d.* per foot, amounts to the sum of 17*l.* 3*s.* 6*d.* I understand your objection to complete your contract is on the ground that the timber is faulty and unsound, but there is sufficient evidence to show that the same timber is very kind and superior, &c. &c." The defendant replied, "I have this moment received a letter from you respecting Mr. Smith's timber, which I bought of him at 1*s.* 6*d.* per foot, *to be sound and good*, which I have some doubts whether it is or not, but he prom-

² L. R. 1 C. P. 407; 35 L. J. C. P. 224.

³ *Richards v. Porter* seems also irreconcilable with the opinion of

the Court as expressed by Erle C. J. in *Bailey v. Sweeting*, *post*, p. 217.

¹ 9 B. & C. 561. See, also, *Archer v. Baynes*, 5 Ex. 625; 20 L. J. Ex. 54.

ised to make it so, *and now denies it.*" Held, that the letters were not consistent, and did not satisfy the statute. Bayley J. said: "What the real terms of the statute were is left in doubt, and must be ascertained by verbal testimony. The object of the statute was that the note in writing should exclude all doubt as to the terms of the contract, and that object is not satisfied by defendant's letter." The other judges concurred.²

§ 258. [*Pierce v. Corf*,¹ which, like *Hinde v. Whitehouse*, arose out of a sale by auction, was an action to recover from an auctioneer damages for negligence in not making a binding contract for the sale of the plaintiff's mare. The defendant had a sales' ledger, which was headed "Sales by auction 28th March, 1872," in which the plaintiff's mare was numbered 49. A printed catalogue of the horses to be sold, with conditions of sale annexed, was circulated, and the plaintiff's mare was therein also numbered 49, but neither the catalogue nor the conditions were annexed to the sales' ledger nor referred to therein. The mare was put up for sale and knocked down to one Thomas Macquire for thirty-three guineas. Thereupon the defendant's clerk wrote in the *columns of the sales' ledger, left blank for the [*192] purpose, the name of the purchaser and the price. The purchaser afterwards refused to take the mare. Held that the catalogue and sales' ledger were not sufficiently connected to form a memorandum sufficient to satisfy the statute.²]

§ 259. The leading case under the *fourth* section of the Statute of Frauds, usually cited in all disputes as to the construction of the words now under consideration, is *Boydell v. Drummond*,¹ decided in the King's Bench in 1809. The defendant was sued as one of the subscribers for the celebrated Boydell prints of scenes in Shakespeare's plays, and the

² See *Buxton v. Rust*, L. R. 1 Ex. 1; *Dalton v. McBride*, 7 Grant (Ont.) 288.

¹ L. R. 9 Q. B. 210.

² See, also, *Rishton v. Whatmore*, 8 Ch. D. 468.

¹ 11 East, 142. See, also, *Fitzmaurice v. Bailey*, 9 H. L. C. 78, and *Crane v. Powell*, L. R. 4 C. P. 123.

terms of the subscription were set out in a prospectus. The proof offered was the defendant's signature in a book entitled "Shakespeare Subscribers, their Signatures." But there was nothing in the book referring to the prospectus, and it was impossible to connect the book with the prospectus showing the terms of the bargain, without parol testimony. Some letters of the defendant were also offered, but equally void of reference to the terms of the bargain. The plaintiff was nonsuited at Nisi Prius, and the nonsuit was confirmed by the unanimous opinion of the judges, Lord Ellenborough C. J., Grose, Le Blanc, and Bayley, JJ.

In *Dobell v. Hutchinson*,² in 1835, the King's Bench held, under the 4th section of the Act, that in a sale at auction where the letters of the defendants, the purchasers, referred distinctly to the conditions of sale signed by the plaintiff, and which they had in their hands, the clause of the statute was completely satisfied, because no parol evidence of any kind was requisite to show the contract, except proof of handwriting, which is necessary in all cases.

So in *Laythorp v. Bryant*,³ in 1836, the Exchequer of Pleas held that the defendant, who had signed a memorandum of his purchase at auction, was bound by it, although imperfect in itself, because it referred to the conditions of sale, and those conditions were on the same paper, [*193] the *agreement having been written on the back of a paper containing the terms and conditions.

§ 260. It has been held that the note or memorandum required by the statute need not be addressed to or pass between the parties, but may be addressed to a *third person*. In *Gibson v. Holland*,¹ decided in 1865, one of the pieces of paper relied on as constituting the written note of the bargain was a letter written by the defendant to his own agent. *Held*, to be sufficient by Erle C. J., and Willes and Keating JJ.² This case was decided principally upon the authority of Sir Edward Sugden's "Treatise on Vendors and Purchasers,"³ in which he says: "A note or letter written by

¹ 3 A. & E. 370.

² 2 Bing. N. C. 735.

³ L. R. 1 C. P. 1; 35 L. J. C. P. 5.

² See, also, *McMillan v. Bentley*,

16 Grant (Ont.) 387.

³ At p. 139, par. 39, in 14th Ed.

the vendor to any third person, containing directions to carry the agreement into execution, will (subject to the before-mentioned rules) be a sufficient agreement to take a case out of the statute," and on the authorities in the Chancery Reports there cited.⁴

§ 261. No case has arisen under the statute on the question whether the writing is required to be in ink, but there seems no reason to doubt that the common law rule would apply, and that a writing in pencil would be held sufficient to satisfy the 17th section.¹

See, also, 1 Sm. L. C. p. 326, notes to *Birkmyr v. Darnell*.

⁴ *The memorandum will be sufficient* if it be only a letter written by the party to his agent or even an entry or record in his own book containing an express revocation of the contract. *Townsend v. Hargraves*, 118 Mass. 325, 336; *Kleeman v. Collins*, 9 Bush. (Ky.) 460, 467; *Fugate v. Hansford's Ex'r's*, 3 Litt. (Ky.) 262; *Tufts v. Plymouth Gold Mining Co.*, 96 Mass. (14 Allen) 407; *Moore v. Mountcastle*, 61 Mo. 424; *Peabody v. Speyers*, 56 N. Y. 230; *Argus Co. v. Albany*, 55 N. Y. 495; s. c. 14 Am. Rep. 296; *Clark v. Tucker*, 2 Sandf. (N. Y.) 157; *Kinloch v. Savage*, *Speer's* (S. C.) Eq. 470; *Buck v. Pickwell*, 27 Vt. 167; *Barry v. Coombe*, 26 U. S. (1 Pet.) 640, 651; bk. 7, L. ed. 295; *Gillespie v. Grover*, 3 Grant (Ont.) 558; *Gibson v. Holland*, L. R. 1. C. P. 1; *Buxton v. Rust*, L. R. 7 Ex. 1, 279; *Leroux v. Brown*, 12 C. B. 801; *Goodwin v. Fielding*, 4 DeG. M. & G. 90; *Bradford v. Roulston*, 8 Ir. C. L. R. 473; *Allen v. Bennett*, 3 Taunt. 169.

A resolution of the common counsel of a city referring to a previous resolution, both of which are entered on the minutes and signed by a clerk, are sufficient. *Argus Co. v. Albany*, 55 N. Y. 495; s. c. 14 Am. Rep. 296; and also of a religious society, *Johnson v. Trinity Church Society*, 91 Mass. (11 Allen) 123.

¹ See *Geary v. Physic*, 5 B. & C. 234.

Writing in pencil.—A memorandum of a contract for the purchase of goods, written by the broker employed to purchase, with lead pencil in a book, is a sufficient writing within the Statute of Frauds. *Lee v. Mahoney*, 9 Iowa, 344; *Clason v. Bailey*, 14 Johns. (N. Y.) 484, 491; *Merritt v. Clason*, 12 Johns. (N. Y.) 102; s. c. 7 Am. Dec. 286; 1 *Langdell Lead. Cas.* 537; *Draper v. Pattina*, 2 Speers (S. C.) 292; *McDowell v. Chambers*, 1 Strobb. (S. C.) Eq. 347; s. c. 47 Am. Dec. 539; *Ryan v. Salt*, 3 Up. Can. C. P. 83; *Geary v. Physic*, 5 Barn. & Cress. 213; 3 Par. on Contr. 9. The case of *Merritt v. Clason* was carried to the court of errors and is reported *sub nom.* *Clason v. Bailey*, 14 Johns. (N. Y.) 484; s. c. 1 *Langdell Lead. Cas.* on Contra. 541.

Writing is the expression of ideas by visible letters, and may be on paper, wood, stone, or other material. The ten commandments were written with the finger of God on tables of stone: Ex. xxxi. 18. The general rule undoubtedly is, that wherever a statute or usage requires a writing, it must be made on paper or parchment; but it is not essentially necessary it be in ink; it may be in pencil. *Myers v. Vanderhalt*, 84 Pa. St. 510; s. c. 24 Am. Rep. 227. This view is sustained by numerous authorities as applied to contracts generally. *Clason*

Section II. — WHAT IS A SUFFICIENT NOTE OR MEMORANDUM OF THE BARGAIN MADE.

§ 262. After the production and proof (by the party seeking to enforce the contract) of a written note or memorandum, whether contained in one or several pieces of paper, the next inquiry which arises is, whether the contents of the writing so proven form a sufficient note "of the bargain made."

So far as the 4th section of the statute is concerned, a very rigorous interpretation was placed on it in an early case, and is now the settled rule. In *Wain v. Warlters*,¹ which was the case of a promise in writing to pay the debt of a third person, but where the consideration for the [*194] *promise was not stated in the writing, it was held that parol proof of the consideration was inadmissible under the statute, and the promise was therefore held void as *nudum pactum*. The case turned on the construction of the word "agreement," which was held to include all the stipulations of the contract, showing what *both* parties were to do, not the mere "promise" of what the party to be charged undertook to do. The consideration was therefore held to be a part of the "agreement," and as the statute required the whole "agreement," or some note or memorandum of it, to be in writing, the Court inferred that a memorandum which showed no consideration must either be the whole agreement, and in that case void as *nudum pactum*, or part only of the agreement, and in that case insufficient to satisfy the statute. The judges were Lord Ellenborough C. J., and Grose, Lawrence, and Le Blanc, JJ.

Although this case was strongly controverted, chiefly in the courts of equity, as will be seen by reference to the

v. Bailey, 14 Johns. (N. Y.) 490; *Merritt v. Clason*, 12 Johns. (N. Y.) 102; s. c. 7 Am. Dec. 286; *Geary v. Physic*, 5 Barn. & Cress. 213; *Jeffrey v. Walton*, 1 Stark. 267; *Chitty on Contr.* 91.

The same rule applies to promissory notes: *Brown v. Butcher's & Dro-*

ver's Bank, 6 Hill (N. Y.) 443; s. c. 41 Am. Dec. 755; *Partridge v. Davis*, 20 Vt. 499; *Closson v. Stearns*, 4 Vt. 11; s. c. 23 Am. Dec. 245; *Geary v. Physic*, 5 Barn. & Cress. 213; *Story on Prom. Notes*, sec. 11; *Byles on Bills*, 134.

¹ 5 East, 10, § 262.

argument of Taunton in the case of *Phillips v. Bateman*,² where he sums up all the objections to the decision, it was upheld and followed in subsequent cases,³ and the law now remains settled as it was propounded in *Wain v. Warlters*,

² 16 East, 356, at p. 374.

³ *Saunders v. Wakefield*, 4 B. & Ald. 595; *Jenkins v. Reynolds*, 3 B. & B. 14; and *Lyon v. Lamb*, there cited at p. 22; *Morley v. Boothby*, 3 Bing. 107; *Fitzmaurice v. Bayley*, 9 H. L. C. 79. And see the authorities under the 4th section collected in *Sugden's V. & P.*, p. 134, 14th ed.

In construing the fourth section of the Statute of Frauds, many of the American states follow the English doctrine, holding that it is necessary that the consideration of the agreement should appear in the memorandum. *Vide ante*, § 248, note 1. This doctrine is held in Alabama. *Balling v. Munchus*, 65 Ala. 558; *Rigby v. Norwood*, 34 Ala. 129. These decisions are under the Code of 1876, § 212, which require that the consideration be in the contract.

In *Delaware*, *Weldin v. Porter*, 4 Houst. (Del.) 236.

In *Georgia*, *Henderson v. Johnson*, 6 Ga. 390.

In *Indiana*, *Gregory v. Logan*, 7 Blackf. (Ind.) 112. But this decision was before the rule was fixed by statute in Rev. Stat. 1852, c. 42, § 2.

In *Maryland*, *Edelen v. Gough*, 5 Gill (Md.) 103; *Elliot v. Giese*, 7 Harr. & J. (Md.) 457; *Wyman v. Gray*, 7 Harr. & J. (Md.) 409.

In *Michigan*, *Jones v. Palmer*, 1 Doug (Mich.) 379.

In *Minnesota*, *Nichols v. Allen*, 23 Minn. 542.

In *New Hampshire*, *Underwood v. Campbell*, 14 N. H. 393; *Neelson v. Sanborne*, 2 N. H. 414.

In *New Jersey*, *Buckley v. Beardslee*, 5 N. J. L. (2 South.) 570; *Laing v. Lee*, 20 N. J. L. (1 Spen.) 337.

In *New York*, *Stone v. Browning*, 68 N. Y. 598; *Newbery v. Wall*, 65

N. Y. 484; *Miller v. Cook*, 23 N. Y. 495; *Gates v. McKee*, 13 N. Y. 232; s. c. 44 Am. Dec. 545; *Bennett v. Pratt*, 4 Den. (N. Y.) 278; *Castle v. Beardsley*, 10 Hun (N. Y.) 343; *Kerr v. Shaw*, 13 Johns. (N. Y.) 236; *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 37; s. c. 5 Am. Dec. 317; *Sears v. Brink*, 3 Johns. (N. Y.) 210; s. c. 3 Am. Dec. 475; *Parker v. Willson*, 15 Wend. (N. Y.) 346; *Rogers v. Kneeland*, 10 Wend. (N. Y.) 218, 256.

In *Pennsylvania*, *Soles v. Hickman*, 20 Pa. St. 180.

In *South Carolina*, *Meadows v. Meadows*, 3 McC. (S. C.) 458; s. c. 15 Am. Dec. 645; *Stephens v. Winn*, 2 Nott & McC. (S. C.) 372.

In *Wisconsin*, *Taylor v. Pratt*, 3 Wis. 674; *Reynolds v. Carpenter*, 3 Chand. (Wis.) 31.

In other states the English doctrine is repudiated, and where the word "promise" or some like thing is substituted for the word "agreement," or is coupled with it in a statute, it has been held that the statement of the consideration is not necessary. *Thompson v. Hall*, 16 Ala. 204; *Dorman v. Bigelow*, 1 Fla. 281; *Ratliff v. Trout*, 6 J. J. Marsh. (Ky.) 606; *Wren v. Pearce*, 4 Smed. & M. (Miss.) 91; *Taylor v. Ross*, 3 Yerg. (Tenn.) 330; *Gilman v. Kibler*, 5 Humph. (Tenn.) 19; *Campbell v. Findley*, 3 Humph. (Tenn.) 330; *Violett v. Patton*, 9 N. S. (5 Cr.) 151.

The English doctrine is repudiated in the following states:—

In *Connecticut*, *Sage v. Wilcox*, 6 Conn. 81.

In *Indiana*, the statute of 1852, c. 42, § 2, provides that the consideration may be proved by parol.

In *Maine*, *Williams v. Robinson*, 73 Me. 186; s. c. 40 Am. Rep. 352;

except so far as guarantees are concerned, in relation to which the legislature intervened and made special provision in 19 & 20 Vict. c. 97, s. 3 (Mercantile Law Amendment Act, 1856).

§ 263. But under the 17th section of the statute the decisions have not maintained so rigorous a construction, and the judges have repeatedly referred to the distinction between the word "agreement" in the fourth section and "bargain" in the seventeenth. The cases will now be considered with reference exclusively to the contract of sale under the latter section, and to the inquiry whether, [*195] and to what extent, it is * necessary that the writing should show, 1st, the names of the parties to the sale; 2dly, the terms and subject-matter of the contract.

§ 264. On the first point, it is settled to be indispensable that the written memorandum should show not only who is the person to be charged, but also who is the party in whose favor he is charged. The name of the party to be charged is required by the statute to be signed, so that there can be no question of the necessity of his name in the writing. But the authorities have equally established that the name or a sufficient description of the other party is indispensable, because without it no contract is shown, inasmuch as a stipulation or promise by A. does not bind him, save to the person to whom the promise was made, and until that person's name is shown it is impossible to say that the writing contains a memorandum of the bargain.¹

Gilligan v. Boardman, 29 Me. 81; *Cummings v. Dennett*, 26 Me. 399, 400; *Levy v. Merrill*, 4 Me. (4 Greenl.) 189.

In Massachusetts, *Wetherbee v. Potter*, 99 Mass. 362; *Packard v. Richardson*, 17 Mass. 122; s. c. 9 Am. Dec. 123; Pub. Stats. c. 73, § 2.

In Missouri, *Halsa v. Halsa*, 8 Mo. 303.

In North Carolina, *Miller v. Irvine*, 1 Dev. & Bat. (N. C.) 103; *Ashford v. Robinson*, 8 Ired. (N. C.) 114.

In Ohio, *Reed v. Evans*, 17 Ohio. 128.

In Texas, *Fulton v. Robinson*, 55 Tex. 401; *Adkins v. Watson*, 12 Tex. 199.

¹ *Memorandum must show who the parties are.* — See *ante*, § 248, note 1. Also, *Osborn v. Phelps*, 19 Conn. 73; s. c. 48 Am. Dec. 133; *Nichols v. Johnson*, 10 Conn. 198; *Wood v. Davis*, 82 Ill. 311; *McConnell v. Brillhart*, 17 Ill. 354, 360; s. c. 65 Am. Dec. 661; *Williams v. Robinson*,

§ 265. In *Champion v. Plummer*,¹ the plaintiff, by his agent, wrote down in a memorandum-book the terms of a verbal sale to him by the defendant, and the defendant signed the writing, but the words were simply "Bought of W. Plummer, &c.," with no name of the person who bought. Sir James Mansfield C. J. said, "How can that be said to be a contract, or memorandum of a contract, which does not state who are the contracting parties? By this note it does not at all appear to whom the goods were sold. *It would prove a sale to any other person as well as to the plaintiffs.*"

In *Allen v. Bennett*,² the agreement was written in a book belonging to the plaintiff, and was signed by the defendant's agent. But the plaintiff's name was not in the book, and was not mentioned in the written memorandum. This was considered insufficient, but the defect was afterwards supplied by other writings showing the plaintiff to be the person with whom the bargain was made.

In *Williams v. Lake*,³ which was under the 4th section,

73 Me. 186, 195; s. c. 40 Am. Rep. 352; *Lincoln v. Erie Preserving Co.*, 132 Mass. 129; *Sanborn v. Flagler*, 91 Mass. (9 Allen) 476; *Coddington v. Goddard*, 82 Mass. (16 Gray) 442, 443; *Waterman v. Meigs*, 58 Mass. (4 Cush.) 497; *Brown v. Whipple*, 58 N. H. 229; *Webster v. Ela*, 5 N. H. 540; *Johnson v. Buck*, 35 N. J. L. (6 Vr.) 338, 343; s. c. 10 Am. Rep. 243; *Bailey v. Ogden*, 3 Johns. (N. Y.) 399; s. c. 3 Am. Dec. 509; *Harvey v. Stevens*, 43 Vt. 653; *Grafton v. Cummings*, 99 U. S. (9 Otto) 100, 107; bk. 25, L. ed. 336; *Beckwith v. Talbot*, 95 U. S. (5 Otto) 289; bk. 24, L. ed. 496; *Salmon Falls Manuf. Co. v. Goddard*, 55 U. S. (14 How.) 446; bk. 14, L. ed. 493; *Barry v. Law*, 1 Cr. C. C. 77; *Hope v. Dixon*, 22 Grant (Ont.) 439; *Clipperton v. Spettigue*, 15 Grant (Ont.) 269.

Should distinguish the parties.—It has generally been held that the memorandum should also distinguish the parties in such a manner as to

indicate which is the buyer and which the seller. See *Osborn v. Phelps*, 19 Conn. 73; s. c. 48 Am. Dec. 133; *Nichols v. Johnson*, 10 Conn. 198; *Lincoln v. Erie Preserving Co.*, 132 Mass. 129; *Sanborn v. Flagler*, 91 Mass. (9 Allen) 474; *Calkins v. Falk*, 1 Abb. (N. Y.) App. Dec. 291; s. c. 38 How. (N. Y.) Pr. 62; *Grafton v. Cummings*, 99 U. S. (9 Otto) 100; bk. 25, L. ed. 336; *Salmon Falls Manuf. Co. v. Goddard*, 55 U. S. (14 How.) 446; bk. 14, L. ed. 493; *Coate v. Terry*, 24 Up. Can. C. P. 571; *Flintoft v. Elmore*, 18 Up. Can. C. P. 274; *Sale v. Lambert*, L. R. 18 Eq. 1; *Cameron v. Spiking*, 25 Grant (Ont.) 116. However, there is a distinction drawn in *Salmon Manuf. Co. v. Goddard*, 55 U. S. (14 How.) 446; bk. 14, L. ed. 493.

¹ 3 B. & P. 252.

² 3 Taunt. 169. See, also, *Cooper v. Smith*, 15 East, 103, and *Jacob v. Kirke*, 2 M. & R. 222.

³ 29 L. J. Q. B. 1; 2 E. & E. 849.

the defendant wrote a note binding himself as guar-
[*196]antor, *and gave it to a third person for delivery.

But the name of the person to whom the note was addressed was not written in the note. Held, by all the judges, insufficient to satisfy the statute, and this decision was approved and followed in *Williams v. Byrnes* (1 Moo. P. C. C., N. S. 154).

In *Sarl v. Bourdillon*,⁴ under the 17th section, the defendant signed an order for goods in the plaintiff's order-book, and the plaintiff's name was on the fly-leaf of his order-book in the usual way, and this was held sufficient under the statute.⁵

§ 266. *Vandenburgh v. Spooner*¹ was a case in which the facts were peculiar. The plaintiff had purchased a quantity of marble at the sale of a wreck. He sold it to the defendant, the amount being more than 10l. The defendant signed this memorandum, "D. Spooner agrees to buy the whole of the lots of marble purchased by Mr. Vandenburgh, now lying at the Lyme Cobb, at 1s. per foot." After the defendant had signed this document, he wrote out what he alleged to be a copy of it, which, at his request, the plaintiff, supposing it to be a genuine copy, signed. This was in the following words: "Mr. J. Vandenburgh agrees to sell to W. D. Spooner the several lots of marble purchased by him, now lying at Lyme, at one shilling the cubic foot, and a bill at one month." Held, that the note signed by the purchaser, although it contained the plaintiff's name, only mentioned it as a part of the description of the goods, so as to identify them, but did not mention the plaintiff as *seller* of the goods, and that the memorandum was therefore insufficient.

*Newell v. Radford*² was in the Common Pleas on these facts. The defendant was a flour-dealer, and the plaintiff a

⁴ 26 L. J. C. P. 78; 1 C. B. N. S. 201, 188.

⁵ This same doctrine prevails in Vermont. *Harvey v. Stevens*, 43 Vt. 653. In this case the buyer's name was entered by the auctioneer's clerk, with the terms of the sale in a book, marked "John Harvey's auc-

tion book," which was held to be a sufficient memorandum of the contract. See, also, *Sarl v. Bourdillon*, 1 C. B. N. S. 188; s. c. 37 Eng. L. & E. 415; 2 Jur. N. S. 1208; 26 L. J. C. P. 78.

¹ L. R. 1 Ex. 316; 35 L. J. Ex.

² L. R. 3 C. P. 52; 37 L. J. C. P. 1.

baker. The defendant's agent entered in the plaintiff's book the following words:—"Mr. Newhell, 32 sacks, culasses, at 39s. 280 lbs. To await orders. John Williams."

The defendant insisted, on the authority of *Vandenburgh v. Spooner*, that as it was impossible to tell from this * memorandum which was buyer and which was [*197] seller, the memorandum was insufficient, but the Court held that parol evidence had been properly admitted to show the trade of each party, and thus to create the inference from the circumstances of the case that the baker was the buyer of the flour. There was also some correspondence referred to, showing who was the buyer and who the seller.³

§ 267. But although the authorities are consistent in requiring that the memorandum should show who are the parties to the contract, it suffices if this appear by description instead of name. If one party is not designated at all, plainly the whole contract is not in writing, for "it takes two to make a bargain." In such a case the common law would permit parol testimony to show who the other is, but this is forbidden by the statute. But if the writing shows by description with whom the bargain was made, then the statute is satisfied, and parol evidence is admissible to *apply the description*: that is, not to show with whom the bargain is made, but who is the person described, so as to enable the Court to understand the description. This is no infringement of the statute, for in all cases where written evidence is required by law there must be a parol evidence to apply the document to the subject-matter in controversy.

§ 268. [The difficulty arises in determining upon the sufficiency of the description given in each particular case. There have been numerous decisions on this point. Thus, it was held by the present Master of the Rolls, in a case under the 4th section, that a vendor was sufficiently described by the term "proprietor," there being but one.¹ On the other

³ *Vide ante*, sec. 264, note 1.

¹ *Sale v. Lambert*, 18 Eq. 1, [distinguished in *Grafton v. Cummings*, 99

U. S. (9 Otto) 100, 110; bk. 25, L. ed. 366]; and *Rossiter v. Miller*, 46 L. J. Ch. 228; 5 Ch. D. 648, C. A.;

hand, the description "vendor" was held by the same learned judge to be insufficient.² Again, when it appeared from conditions of sale that the vendors were a company in possession of the property, they were held to be sufficiently *described;³ and so when the vendor was stated to be "a trustee selling under a trust for sale."⁴

In every case there must be sufficient evidence to identify from the description, and, to use the language of the present Master of the Rolls, in *Commings v. Scott*,⁵ "the Court ought to be careful not to manufacture descriptions, or to be astute to discover descriptions which a jury would not identify."]

§ 269. The cases in which this principle has been most clearly illustrated are those which arise in a very common course of mercantile dealing, where an agent signs a contract in his own name and without mentioning his principal.

It is settled that though in dealings of this kind it is not competent for the agent thus contracting to introduce parol proof to show that he did not intend to bind himself, because this would be to contradict what he had written, it is competent for the other party to show that the contract was really made with the principal who had chosen to describe himself by the name of his agent, just as it would be admissible to show his identity if he had used a feigned name.¹

s. c. 3 App. Cas. 1124, reversing the C. A. upon another point.

² *Potter v. Duffield*, 18 Eq. 4. See the dicta of the judges in *Thomas v. Brown*, 1 Q. B. D. 714, and the remarks of Jessel M. R., dissenting therefrom in *Rossiter v. Miller*, reported in 46 L. J. Ch. 228, at p. 232.

³ *Commings v. Scott*, 20 Eq. 11.

⁴ *Catling v. King*, 5 Ch. D. 660, C. A. See, also, as to sufficiency of description of the property sold, *Shardlow v. Cotterell*, 20 Ch. D. 90, C. A.; reversing s. c. 18 Ch. D. 280; *Beer v. London and Paris Hotel Co.*, 20 Eq. 412; *Thomas v. Brown*, 1 Q. B. D. 714; *Williams v. Jordan*, 6 Ch. D. 517.

⁵ 20 Eq. at p. 16.

¹ *Signature by agent legally repre-*

sented the principals is sufficient. *Browne on Statute of Frauds* (3rd ed.) Appendix. The memorandum may therefore be signed by or on behalf of both seller or buyer, and will be binding, although the person should sign in his own name, if it be mutually understood at the time that he sign as the agent of one of the contracting parties. *Sanborn v. Flager*, 91 Mass. (9 Allen) 477; *Williams v. Bacon*, 68 Mass. (2 Gray) 387, 393; *Wiener v. Whipple*, 53 Wis. 298; s. c. 40 Am. Rep. 775. See *Huntington v. Knox*, 61 Mass. (7 Cush.) 371; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72; *Stowell v. Eldred*, 39 Wis. 615; *Trueman v. Loder*, 11 Ad. & El. 589, 594; *Higgins v. Senior*, 8 Mees. & W. 840; *Story on Agency*, sec. 410.

[But a commission agent acting here for a foreign principal is not, in the absence of express authority, entitled to pledge the foreign principal's credit. In such a case the agent renders himself personally liable, and the foreign principal cannot sue or be sued upon the contracts entered into by the agent.² This apparent exception to the rule arises from the real character of the relationship existing between the commission agent and his foreign constituent, a relationship which in its nature and effects is one of vendor and vendee, and not one of principal and agent.³ Thus it is that

A contract made by an agent in the name of his principal may be enforced by the principal the same as though made by himself (Barry v. Page, 76 Mass. (10 Gray) 398; Hsley v. Merriam, 61 Mass. (7 Cush.) 242; s. c. 54 Am. Dec. 721; Dykers v. Townsend, 24 N. Y. 57, 61; Bassett v. Lederer, 1 Hun (N. Y.) 274; Small v. Attwood, Young, 407); even though the name of the principal be not disclosed (Woodruff v. McGehee, 30 Ga. 158; Graham v. Duckwall, 8 Bush. (Ky.) 12; Foster v. Smith, 2 Coldw. (Tenn.) 474; Culver v. Bigelow, 43 Vt. 249; Weiner v. Whipple, 53 Wis. 298; s. c. 40 Am. Rep. 775. See, also, Brainard v. Turner, 4 Ill. App. 61; Perth Amboy Manuf. Co. v. Condit, 21 N. J. L. (1 Zab.) 659, 664; Hill v. Miller, 76 N. Y. 32; Jessup v. Steurer, 75 N. Y. 613; Meeker v. Claghorn, 44 N. Y. 349. However, a distinction as to the liability of the principal is to be made between those cases where the agency is known and those where it is not known. See Mahoney v. McLean, 26 Minn. 415; Chandler v. Coe, 54 N. H. 561, 575; s. c. 22 Am. Rep. 437.

² *Armstrong v. Stokes*, L. R. 7 Q. B. 598, *per Cur.*, at p. 605; *Elbinger Co. v. Clay*, L. R. 8 Q. B. 313; *Hutton v. Bullock*, *ibid.* 331, affirmed in *Ex. Ch.*, L. R. 9 Q. B. 572.

³ See the opinion of Blackburn J. in *Ireland v. Livingston*, L. R. 5 H. L. at p. 408.

Personal liability by agent of foreign principal.—Where an agent of a foreign principal discloses his contract made for and in his behalf is not personally liable. See *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244. The Supreme Court of the United States, in *Oedricks v. Ford*, 64 U. S. (23 How.) 49; bk. 16, L. ed. 534, say that where the name of the principal is disclosed in the contract, and the place of his residence given, he is regarded as the person making the contract, through his agent. This fixes the duty of performance on the principal and exonerates the agent. But the agent will be personally liable where he does not disclose his principal, although he describes himself as "agent." *Hancock v. Fairfield*, 30 Me. 299; *Forster v. Fuller*, 6 Mass. 53; s. c. 4 Am. Dec. 87; *Tippets v. Walker*, 4 Mass. 595; *DeWitt v. Walton*, 9 N. Y. 571; *Moss v. Livingston*, 4 N. Y. 208; *Hills v. Bannister*, 3 Cow. (N. Y.) 31; *Stone v. Wood*, 7 Cow. (N. Y.) 453; s. c. 17 Am. Dec. 529; *Dean v. Roesler*, 1 Hill (N. Y.) 420; *White v. Skinner*, 13 Johns. (N. Y.) 307; s. c. 7 Am. Dec. 381; *Taft v. Brewster*, 9 Johns. (N. Y.) 334; s. c. 6 Am. Dec. 280; *Bolles v. Walton*, 2 E. D. Smith (N. Y.) 164; *Lincoln v. Crandell*, 21 Wend. (N. Y.) 101; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271; s. c. 25 Am. Dec. 558; *Rossiter v. Rossiter*, 8 Wend. (N. Y.) 494; s. c. 24 Am.

the commission agent may exercise the right of stoppage [*199] page *in transitu upon the insolvency of his foreign constituent. See *post*, Book V. Part I. Ch. 5, sec. 1, *Stoppage in Transitu*.]

In *Trueman v. Loder*,⁴ the defendant was sued on a broker's sold note in these words: "London, 28th April, 1835. Sold for Mr. Edward Higginbotham, &c., &c." The proof was, that in 1832 the defendant, a merchant of St. Petersburg, had established Higginbotham to conduct the defendant's business in London in the name of Higginbotham, which was painted outside the counting-house and employed in all the contracts. The agent had no business, capital, nor credit of his own, but did everything with the defendant's money and for his benefit under his instructions. The case was argued by very able counsel in Michaelmas Term, 1838, and the judges took time to consider till the ensuing term, when Lord Denman delivered the opinion of the Court, composed of himself, and Patterson, Williams, and Coleridge, JJ. On the question made, that the name of the defendant was not in the written contract, the Court said: "Among the ingenious arguments pressed by the defendant's counsel, there was one which it may be fit to notice; the supposition that parol evidence was introduced to vary the contract, showing it not to have been made by Higginbotham, but by the defendant, who gave him the authority. Parol evidence is always necessary to show that the party sued is the person making the contract and bound by it. Whether he does so in his own name, or in that of another, or in a feigned name, and whether the contract be signed by his own hand, or by that of an agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If he is sued for the price, and his identity made out, the con-

Dec. 62; *Minard v. Mead*, 7 Wend. (N. Y.) 28; *Guyon v. Lewis*, 7 Wend. (N. Y.) 26; *Barker v. Mechanics' F. Ins. Co.*, 3 Wend. (N. Y.) 94; s. c. 20 Am. Dec. 664; *Duvall v. Craig*, 15 U. S. (2 Wheat.) 45, 56; bk. 4, L. ed. 180, 183; *Appleton v. Binks*, 5

East, 148; *Tanner v. Christian*, 29 Eng. L. & E. 103; *Chadwick v. Maden*, 12 Eng. L. & E. 180; *Higgins v. Senior*, 8 Mees. & W. 834; *Magee v. Atkinson*, 2 Mees. & W. 440; see sec. 270, note 3.

⁴ 11 A. & E. 587.

tract is not varied by appearing to have been made by him in a name not his own.⁵

§ 270. The leading case for the converse proposition, namely, that the agent who has contracted in his own name will not be allowed to offer parol evidence for the purpose of proving *that he did not intend to bind [*200] himself, but only his principal, is *Higgins v. Senior*,¹ decided in the Exchequer in 1841, in which also the judges took time to consider until the ensuing term, when Parke B. delivered the judgment of the Court, composed of himself and Alderson, Gurney, and Rolfe, BB. The opinion states the question submitted to be, "Whether in an action or an agreement in writing, purporting on the face of it to be made by the defendant, and to be subscribed by him, for the sale and delivery by him of goods above the value of 10*l.*, it is competent for the defendant to discharge himself on an issue on the plea of *non assumpsit*, by proving that the agreement was really made by him by the authority of, and as agent for, a third person, and that the plaintiff knew those facts at the time when this agreement was made and signed." Held, in the negative. The learned Baron then proceeded to lay down the principles on which this conclusion was reached, as follows: "There is no doubt that where such an agreement is made, it is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the un-named principals; and this, whether the agreement be or be not required to be in writing, by the Statute of Frauds,² and this evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom, on the face of it, it purports to bind;

⁵ See also 2 Sm. L. Cas. (ed. 1879), in notes to *Thompson v. Davenport*, p. 407 et seq.; and *Calder v. Dobell*, L. R. 6 C. P. 486, 499.

¹ 8 M. & W. 834.

² See *ante*, sec. 246, note 1. Also *Eastern R. R. Co. v. Benedict*, 71

Mass. (5 Gray) 561; s. c. 66 Am. Dec. 384; *Fuller v. Hooper*, 69 Mass. (3 Gray) 341; *Williams v. Bacon*, 68 Mass. (2 Gray) 387, 393; *Bank v. Raymond*, 57 N. H. 144; *Dykens v. Townsend*, 24 N. Y. 57.

but shows that it also binds another, by reason that the act of the agent, in signing the agreement, in pursuance of his authority, is in law the act of the principal.

"But, on the other hand, to allow evidence to be given, that the party who appears on the face of the instrument to be personally a contracting party, is not such, would be to allow parol evidence to contradict the written agreement, which cannot be done."⁸

[*201] *§ 271. Where the broker bought expressly for his principals but without disclosing their names in the sold note he was held liable to the vendor on evidence of usage that the broker was liable personally when the name of the principal was not disclosed at the time of the contract.¹

In *Fleet v. Murton*,² the contract note was, "We have this day sold for your account to our principal," (Signed) M. & W., Brokers; and the brokers were held personally liable on proof of usage of the trade to the same effect as that given in *Humfrey v. Dale*.¹

§ 272. [And in *Hutchinson v. Tatham*,¹ where the defendants acting as agents for one Lyons had chartered a ship, and the charter-party was expressed to be made, and was signed by them as "agents to merchants," without disclosing

⁸ See 2 Sm. L. Cas. p. 404, in notes to *Thompson v. Davenport*, where the whole subject is more fully treated than comports with the design of the present treatise. See, also, *Indianapolis, Peru & Chicago Ry. Co. v. Tyng*, 63 N. Y. 653, 655.

Liability of agent. — An agent who contracts in writing as principal without disclosing his agency, cannot afterwards relieve himself of liability, by proving his agency. *Wheeler v. Reed*, 36 Ill. 81, 89; *Nixon v. Downey*, 49 Iowa, 166; *Rushine v. Sebree*, 12 Bush (Ky.) 198; *Welch v. Goodwin*, 123 Mass. 71; s. c. 25 Am. Rep. 23; *Schell v. Stephens*, 50 Mo. 375; *McClellan v. Parker*, 27 Mo. 162; *Chandler v. Coe*, 54 N. H. 561, 576;

s. c. 22 Am. Rep. 437; *Knapp v. Simon*, 86 N. Y. 311; *Cobb v. Knapp*, 71 N. Y. 348; *Coleman v. First Nat. Bank of Elmira*, 53 N. Y. 388; *Meeker v. Claghorn*, 44 N. Y. 349, 351; *Quigley v. DeHaas*, 82 Pa. St. 267, 273; *Beymer v. Bonsall*, 79 Pa. St. 298; *Foster v. Smith*, 2 Coldw. (Tenn.) 474; *Weston v. McMillan*, 42 Wis. 567; *Ford v. Williams*, 62 U. S. (21 How.) 287; bk. 16, L. ed. 36. See § 269, note 3.

¹ *Humphrey v. Dale*, 7 F. & B. 266; E. B. & E. 1004; 26 L. J. Q. B. 137; 27 L. J. Q. B. 390. See, also, *Tetley v. Shand*, 20 W. R. 206; 25 L. T. N. S. 658.

² L. R. 7 Q. B. 126.

¹ L. R. 8 C. P. 482.

the name of their principal. It was held, in an action by the shipowners on the authority of *Humfrey v. Dale* and *Fleet v. Murton*, that evidence was admissible of a custom whereby the broker became personally liable when the principal's name was not disclosed within a reasonable time.

According to the custom of the London Dry Goods Market, a broker, who contracts for the sale of goods without disclosing the name of his principal, becomes personally liable on his principal's default.^{2]}

In *Mollett v. Robinson*,³ the circumstances were these: The plaintiffs, tallow brokers, were employed by the defendant to purchase 50 tons of tallow in the London market; and had like orders from other purchasers. The plaintiffs bought in their own names, without disclosing their principals, tallow enough for all the orders which they had received, and divided it among the principals who had employed them,—sending to the defendant a bought note, signed by themselves as “sworn brokers,” stating 50 tons of *tallow to have been bought “for his [*202] account,” with quality, price, &c., but no vendor's name given. There was no corresponding sold note delivered to any one, and no such purchase as was represented in the bought note. Proof was given that the execution of the defendant's order in this manner was in accordance with the usage of the London market: but the defendant was not aware of the usage, and refused to accept the tallow when he learned how the business had been conducted. *Held*, in the Common Pleas, by Bovill C. J. and Montague Smith J., that the defendant was bound to accept: by Willes and Keating JJ., that usage could not be invoked to change the character of the contract, and that the broker could not make himself the principal in the sale to the defendant without the latter's consent, and there was no other principal than the plaintiffs. In the Exchequer Chamber, Kelly C. B., Channell B., and Blackburn J., agreed in opinion with Bovill C. J. and Smith J., while Mellor

² *Imperial Bank v. London and St. Katharine's Dock Co.*, 5 Ch. D. 196.

³ L. R. 7 H. L. 802, reversing s. c. L. R. 7 C. P. 84; and L. R. 5 C. P. 648.

and Hannen JJ., and Cleasby B., were of the opposite opinion.

[The judgments of the Court of Common Pleas and of the Exchequer Chamber were unanimously reversed by the House of Lords.⁴ It is now, therefore, settled law that when the usage of trade set up is such as goes to alter the *intrinsic character* of the contract as *e.g.*, in *Mollett v. Robinson*, by converting a broker, employed to buy for his employer, into a principal to sell to him,⁵ such usage will not bind a principal who, *ignorant of its existence*, employs a broker to transact business for him on the particular market where it prevails.⁶]

§ 273. Where a broker gives a contract note describing himself as acting for a named principal he cannot [*203] sue personally on the * contract.¹ And *semble*, not even if principal was undisclosed.²

But if the broker contract in his own name, even though he is known to be an agent, he may sue or be sued on the contract.³ And the same rules apply to auctioneers.⁴

⁴ L. R. 7 H. L. 802, *sub nom.* *Robinson v. Mollett*. Of the judges summoned by the House, who had not previously expressed an opinion on the case, Brett and Grove JJ. dissented from, and Amphlett J. supported the judgments of the Court below. The opinion of Brett J. will well repay perusal.

⁵ As to which see *Waddell v. Blockey*, 4 Q. B. D. 678, C. A., and *per cur.* in *De Bussche v. Alt*, 8 Ch. D. 286, C. A.

⁶ See *per* Lord Chelmsford in L. R. 7 H. L. at p. 836.

¹ *Fawkes v. Lamb*, 31 L. J. Q. B. 98; *Fisher v. Marsh*, 6 B. & S. 416, *per* Blackburn J., 34 L. J. Q. B. 178; *Bramwell v. Spiller*, 21 L. T. N. S. 672; *Fairlie v. Fenton*, L. R. 5 Ex. 169.

² *Sharman v. Brandt*, L. R. 6 Q. B. 720, in Ex. Ch.

³ *Short v. Spakeman*, 2 B. & Ad. 962; *Jones v. Littleddale*, 6 A. & E.

486; *Reid v. Draper*, 6 H. & N. 813; 30 L. J. Ex. 268.

As to right of agent to sue for his principal, see *Beller v. Block*, 19 Ark. 566; *Grover v. Warfield*, 50 Ga. 644; *Graham v. Duckwall*, 8 Bush (Ky.) 12; *Kent v. Bornstein*, 94 Mass. (12 Allen) 342; *Minturn v. Main*, 7 N. Y. 220; *White v. Chouteau*, 10 Barb. (N. Y.) 202, 208; *Buckbee v. Brown*, 21 Wend. (N. Y.) 110; *Dugan v. United States*, 16 U. S. (3 Wheat.) 172; bk. 4, L. ed. 362; *Roosevelt v. Doherty*, 129 Mass. 301; *Guernsey v. Cook*, 117 Mass. 548; *Taber v. Cannon*, 49 Mass. (8 Metc.) 456, 460; *Bedford, &c. Ins. Co. v. Covell*, 49 Mass. (8 Metc.) 442; *Raymond v. Crown & Eagle Mills*, 43 Mass. (2 Metc.) 39; *Blakely v. Bennecke*, 59 Mo. 193; *Schell v. Stephens*, 50 Mo. 375; *Cobb v. Knapp*, 71 N. Y. 348; *Mills v. Hunt*, 20 Wend. (N. Y.) 433.

⁴ *Franklyn v. Lamond*, 4 C. B.

And if the broker, though signing as broker, be really the principal, his signature will not bind the opposite party,² and he cannot sue on the contract.³

Where a person describes himself as agent in the body of the contract but signs his own name, he is personally liable on the contract.⁵

637; *Fisher v. Marsh*, 6 B. & S. 411; 34 L. J. Q. B. 177; *Woolfe v. Horne*, 2 Q. B. D. 355. See *Woolfe v. Horne*, 2 Q. B. Div. 355.

⁵ *Paice v. Walker*, L. R. 5 Ex. 173, and cases there cited; but see *Thomson v. Davenport*, notes to 2 Sm. L. C. p. 398, ed. 1879. See, also, *Torry v. Holmes*, 10 Conn. 500; *Merrill v. Wilson*, 6 Ind. 426; *Wilkins v. Duncan*, 2 Litt. (Ky.) 168; *Scott v. Messick*, 4 B. Mon. (Ky.) 535; *Keen v. Sprague*, 3 Me. (3 Greenl.) 77, 80; *Wilder v. Cowles*, 100 Mass. 487; *Cabot Bank v. Morton*, 70 Mass. (4 Gray) 156; *Raymond v. Crown & Eagle Mills*, 43 Mass. (2 Metc.) 319; *Sumner v. Williams*, 8 Mass. 198; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287; *Mauri v. Heffernan*, 13 Johns. (N. Y.) 58; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659, 669; *Mills v. Hunt*, 20 Wend. (N. Y.) 434; *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Beebe v. Robert*, 12 Wend. (N. Y.) 413; *Cunningham v. Soules*, 7 Wend. (N. Y.) 106; *Allen v. Rostain*, 11 Serg. & R. (Pa.) 362; *Bacon v. Sondley*, 3 Strobb. (S. C.) 403; s. c. 61 Am. Dec. 646; *Royce v. Allen*, 28 Vt. 234; *Gadd v. Houghton*, 1 Ex. D. 357.

It is held in some states that an agent is liable where he enters into a contract in his name, and he can not relieve himself from any responsibility, by showing that at the time of entering into the contract, the other party knew of such agency. *Andrews v. Allen*, 4 Harr. (Del.) 462; *Newhall v. Dunlap*, 14 Me. 180; s. c. 31 Am. Dec. 45; *Taber v. Cannon*, 49 Mass. (8 Metc.) 460; *Hastings v.*

Lovering, 19 Mass. (2 Pick.) 221, 222; *Hovey v. Pitcher*, 13 Mo. 191; *Brown v. Rundlett*, 15 N. H. 360; *Savage v. Rix*, 9 N. H. 263; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72; *Rathbon v. Budlong*, 15 Johns. (N. Y.) 1; *Kirkpatrick v. Stainer*, 22 Wend. (N. Y.) 244; *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Meyer v. Barker*, 6 Binn. (Pa.) 234; *Austin v. Roberts*, 2 Miles (Pa.) 254; *Harper v. Williams*, 4 Ad. & E. N. S. 232; *Amos v. Temperly*, 8 Mees. & W. 798; *Byles' Bills* (6th Eng. ed.) 29; *Dunlap's Paley's Agency*, 371. *Vide ante*, §269, note 3. The court say in *Taber v. Cannon*, 49 Mass. (8 Metc.) 460, that it is settled by the authorities where it is known that a person is acting as agent, if he acts in his own name he is personally liable, and his principal will not be liable. See *Huntington v. Knox*, 61 Mass. (7 Cush.) 374; *Bedford Com. Ins. Co. v. Covell*, 49 Mass. (8 Metc.) 442; *Beckham v. Drake*, 9 Mees. & W. 78; s. c. 11 Mees. & W. 315; *Higgins v. Senior*, 8 Mees. & W. 834.

An agent contracting without authority is liable as principal. *Johnson v. Smith*, 21 Conn. 637; *Duncan v. Niles*, 32 Ill. 532; *Noyes v. Loring*, 55 Me. 408; *Bartlett v. Tucker*, 104 Mass. 336; s. c. 6 Am. Rep. 240; *Sheffield v. Ladue*, 16 Minn. 388; *Coffman v. Harrison*, 24 Mo. 524; *Byars v. Doore's Adm'r*, 20 Mo. 284; *Weare v. Gove*, 44 N. H. 196; *Bay v. Cook*, 22 N. J. L. (2 Zab.) 343, 352; *Baltzen v. Nicolay*, 53 N. Y. 467; *Dung v. Parker*, 52 N. Y. 494, 500; *White v. Madison*, 26 N. Y. 117; *Walker v. Bank of New York*, 9 N. Y. 582, 585; *Foster v. Smith*, 2 Cald.

§ 274. [This is the effect of the decision in *Paice v. Walker*,¹ where the sellers describe themselves in the body of the contract "*as agents for*" named principals, but sign their own names, and were held to be personally liable on the contract.² But in *Gadd v. Houghton*,³ where brokers had given the purchaser a sold-note in the following terms: "We have this day sold to you *on account of* John Morand & Co., Valencia, 2,000 cases Valencia oranges, &c.," and signed it without any qualification, the Court of Appeal held that they were not liable. *Paice v. Walker* was distinguished on the ground that the *ratio decidendi* there was that the words "*as agents*" were words of description only, and were not equivalent to a declaration by the defendants that they were making a bargain on another's account, but James L. J., in commenting upon *Paice v. Walker*, said, "If that case were now before us, I should hold that the [*204] words '*as agents*' * in that case had the same effect

(Tenn.) 474, 479. Where a party contracts with an agent, knowing he has authority to act as such, if the contract exceeds the authority of the agent, he cannot hold such agent personally liable on the contract. See *Ogden v. Raymond*, 22 Conn. 384; *Mann v. Richardson*, 66 Ill. 481; *Newman v. Sylvester*, 42 Ind. 106, 112; *Watson v. Rickard*, 25 Kan. 662; *Abeles v. Cochran*, 22 Kan. 405, 414; *Murray v. Carothers*, 1 Met. (Ky.) 71; *Sanborn v. Neal*, 4 Minn. 126; s. c. 77 Am. Dec. 502; *Walker v. Bank of New York*, 9 N. Y. 582, 587; *Aspinwall v. Torrance*, 1 Lans. (N. Y.) 381; *McCurdy v. Rogers*, 21 Wis. 190. *Vide ante*, § 269, note 1.

An agent is not personally liable as such, unless credit is given to him expressly. *Torry v. Holmes*, 10 Conn. 500; *Fleming v. Hill*, 62 Ga. 751; *Gill v. Tison*, 61 Ga. 161; *Merrill v. Wilson*, 6 Ind. 426; *Watson v. Rickard*, 25 Kan. 662; *Wilkins v. Duncan*, 2 Litt. (Ky.) 168; *Scott v. Messick*, 4 B. Mon. (Ky.) 535; *Keen v. Sprague*, 3 Me. (3 Greenl.) 77, 80; *Wilder v. Cowles*, 100. Mass. 487;

Cabot Bank v. Morton, 70 Mass. (4 Gray) 156; *Raymond v. Crown & Eagle Mills*, 43 Mass. (2 Metc.) 319; *Sumner v. Williams*, 8 Mass. 198; s. c. 5 Am. Dec. 83; *Taintor v. Prendergast*, 3 Hill (N. Y.) 72; *Canal Bank v. Bank of Albany*, 1 Hill (N. Y.) 287; *Mauri v. Heffernam*, 13 Johns. (N. Y.) 58; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659, 669; *Mills v. Hunt*, 20 Wend. (N. Y.) 434; *Waring v. Mason*, 18 Wend. (N. Y.) 425; *Beebee v. Robert*, 12 Wend. (N. Y.) 413; *Cunningham v. Soules*, 7 Wend. (N. Y.) 106; *Allen v. Rostain*, 11 Serg. & R. (Pa.) 362; *Bacon v. Sondley*, 3 Strobb. (S. C.) 403; s. c. 51 Am. Dec. 646; *Royce v. Allen*, 28 Vt. 234; *Whitney v. Wyman*, 101 U. S. (11 Otto) 392; bk. 25, L. ed. 1050.

¹ L. R. 5 Ex. 173, and see *Adams v. Hall*, 37 L. T. N. S. 70; and *Weidner v. Hoggett*, 1 C. P. D. 533.

² As to the principal's liability in such a case, see *The Concordia Chemical Co. v. Squire*, 34 L. T. N. S. 824, C. A.

³ 1 Ex. D. 357, C. A.

as the words 'on account of' in the present case, and that the decision in that case ought not to stand."⁴

In *Ogden v. Hall*⁵ the words used were "*on behalf of*," and it was held by the Exchequer Division (diss. Kelly C. B.), that the case was governed by *Gadd v. Houghton*, on the ground that the import of the expressions "on account of" and "on behalf of" was identical.

In *Hough v. Manzanos*⁶ Pollock B. followed Paice v. Walker, stating that he was unable to appreciate the distinction drawn by James L. J. in *Gadd v. Houghton*, between the expressions "as agent for" and "on account of" principals, but that that distinction left Paice v. Walker an authority binding upon him. The correctness, however, of the decision in Paice v. Walker remains questionable.

In *Southwell v. Bowditch*,⁷ it was held that a broker who had signed and sent to the plaintiff a contract note in the following terms: "I have this day sold by your order and for your account, *to my principals*, 5 tons of anthracene (Signed) W. H. Bowditch," was not, *in the absence of usage*, personally liable on the contract.]

§ 275. An extremely able discussion of the subject of a broker's responsibility is found in the remarkable case of *Fowler v. Hollins*.¹ The facts were that the plaintiffs, after refusing to sell to a broker personally, sold thirteen bales of cotton to him on his stating that he was acting for a principal, and the sale note was made to the principal. This was a fraud of the broker who had no authority from the principal, and the broker immediately resold the cotton for cash to the defendants who were also brokers, and were really acting for principals,² but who took a purchase note in their own names, addressed to themselves as follows: "We sell you, &c." The defendants * on the same [*205] day sent a delivery order for the cotton in favor of

⁴ 1 Ex. D. at p. 359.

⁵ 40 L. T. N. S. 751.

⁶ 4 Ex. D. 104.

⁷ 1 C. P. D. 374, C. A., reversing the decision of the Divisional Court, *ib.* p. 100.

¹ L. R. 7 Q. B. 616.

² This is not quite correct. At the time of the sale by Bayley, the fraudulent broker, to them, the defendants had no principals, see *post*, p. 209.

their principals, whom they named in the order, and paid for it. They were reimbursed in the price by their principals, together with their commissions and charges. All these transactions took place on the 23d of December, 1869. The cotton was at once sent by the defendants to the railway station, whence it was taken to the mills of the principals at Stockport, and there manufactured into yarn.

On the 10th of January, 1870, the defendants received a letter from the plaintiffs stating the fraud that had been committed on them, and demanding delivery back to themselves of the cotton. This was the first intimation to the defendants that any fraud had been committed on the plaintiffs, and they replied to the plaintiff's demand, saying: "The cotton was bought by one of our spinners, Messrs. Micholls, Lucas & Co., for cash, and has been made into yarn long ago, and as everything is settled up, we regret we cannot render your clients any assistance."

The plaintiffs thereupon brought trover, and it was left to the jury by Willes J. to say whether the defendants had acted only as agents in the course of the business, and whether they had dealt with the goods only as agents for their principals. The jury found these facts in favor of the defendants, and a verdict was entered for them with leave reserved to the plaintiffs to move to enter a verdict for the value of the thirteen bales. The rule was made absolute in the Queen's Bench (Mellor, Lush, and Hannen, JJ.); and in the Exchequer Chamber, the judgment was affirmed by Martin, Channell, and Cleasby, BB. (diss. Kelly C. B. and Byles and Brett JJ.).

The reason given for affirming the judgment was, that although the defendants had acted as brokers, they had assumed the responsibility of principals by dealing in their own names for an undisclosed principal, Martin and Channell BB. being also of opinion that the plaintiffs were entitled to recover whether the defendants had acted as principal or agents, and that the "facts found by the jury are immaterial. The plaintiffs were strangers to the [*206] sale by * Bayley [the fraudulent broker], whether it was to the defendants or to Micholls. I think they

are entitled to treat the defendants as wrongdoers, wrongfully intermeddling with their cotton, which they had no legal right to touch: and that when they removed the cotton from the warehouse where it was deposited to the railway station, to be forwarded to Stockport to be spun into yarn, and received the price of it, they committed a conversion." *Per Martin B.*, pp. 634-5.

Brett J., on the other hand, delivered a powerful judgment, which the Chief Baron characterized as "logical and exhaustive," and in which both he and Byles J. concurred. The following passages are extracted as a very instructive exposition of the subject under consideration: "The true definition of a broker seems to be that he is an agent employed to make bargains and contracts between other persons in matters of trade, commerce, or navigation. Properly speaking, a broker is a mere negotiator between the other parties. If the contract which the broker makes between the parties be a contract of purchase and sale, the property in the goods, even if they belong to the supposed seller, may or may not pass by the contract. The property may pass by the contract at once, or may not pass till a subsequent appropriation of goods has been made by the seller, and has been assented to by the buyer. Whatever may be the effect of the contract as between the principals, in either case no effect goes out of the broker. If he sign the contract, his signature has no effect as *his*, but only because it is in contemplation of law the signature of *one or both of the principals*. No effect passes *out of the broker* to change the property in the goods. The property changes either by a contract which is not his, or by an appropriation and assent, neither of which is his. In modern times in England, the broker has undertaken a further duty with regard to the contract of the purchase and sale of goods. If the goods be in existence, the broker frequently passes a delivery order to the vendor to be signed, and on its being signed, he passes it to the vendee. In so doing, he still **does no more than act* [*207] as a mere intervener between the principals. He himself, considered as only a broker, has no possession of the goods; no power, actual or legal, of determining the des-

tination of the goods; no power or authority to determine whether the goods belong to buyer or seller, or either; no power, legal or actual, to determine whether the goods shall be delivered to the one or kept by the other. He is throughout merely the negotiator between the parties; and, therefore, by the civil law, brokers were not treated as ordinarily incurring any personal responsibility by their intervention, unless there was some fraud on their part (Story on Agency, sec. 30). And if all a broker has done be what I have hitherto described, I apprehend it to be clear that he would have incurred no personal liability to any one according to English law. He could not be sued by either party to the contract for any breach of it. He could not sue any one in any action in which it was necessary to assert that he was the owner of the goods. He is dealing only with the making of a contract which may or may not be fulfilled, and making himself the intermediary passer on or carrier of a document [*i.e.*, the delivery order], without any liability thereby attaching to him towards either party to the contract. He is, so long as he acts only as a broker in the way described, claiming no property in or use of the goods, or even possession of them, either on his own behalf, or on behalf of any one else. Obedience or disobedience to the contract, and its effects upon the goods, are matters entirely dependent upon the will and conduct of one or both of the principals, and is no way within his cognizance. Under such circumstances, and so far as it seems to me clear, that a broker cannot be sued with effect by any one. If goods have been delivered under a contract so made and a delivery order so passed, still he has had no power, actual or legal, of control either as to the delivery or non-delivery, and probably no knowledge of the delivery, and he has not had possession of the goods. It seems to me impossible to say, that for such a delivery he could be held liable by the real owner of the goods [*208] for a *wrongful conversion. But then in some cases, a broker, though acting as agent for a principal, makes a contract of sale and purchase in his own name. In such case he may be sued by the party with whom he has made such contract for a non-fulfilment of it. But so, also, may

his undisclosed principal; and, although the agent *may be liable upon the contract*, yet I apprehend *nothing passes to him by the contract*. The goods do not become his. He could not hold them even if they were delivered to him, as against his principal. He could not, as it seems to me, in the absence of anything to give him a special property in them, maintain any action in which it was necessary to assert that he was the owner of the goods. The goods would be the property of his principal. And although two persons, it is said, may be liable on the same contract, yet it is impossible that two persons can each be the sole owner of the same goods. Although the agent may be held liable *as a contractor on the contract*, he still is only an agent, and has acted only as agent. He could not be sued, as it seems to me, merely because he had made the contract of purchase and sale in his own name with the vendor—even though the contract should be in a form which passes property in goods by the contract itself—by a *third person*, as if he, the broker, were the owner of the goods; as if, for instance, the goods were a nuisance or an obstruction, or as it were trespassing, he would successfully answer such an action by alleging that he was not the owner of the goods, and by proving that they were the goods of his principal till then undisclosed. If he could not be sued, *for any other tort*, merely on the ground that he had made the contract in his own name with the vendor, it seems to me that he cannot be successfully sued merely *on that ground* by the real owner of the goods as for a wrongful conversion of the goods to his own use.” The learned judge then, after a review of the authorities upon the subject of conversion,⁸ further held that the mere *asportation* of the goods through the agency of * the defendants *before knowl-* [*209] *edge* of the plaintiff’s claim or rights was not sufficient to constitute a conversion, because unaccompanied with any *intention* to deprive the plaintiff of the goods, though that asportation would have been a conversion if made *after* notice of the plaintiff’s claim.

⁸ See on Conversion, *Stephens v. Elwall*, 4 M. & S. 259; *Hardman v. Booth*, 1 H. & C. 103; both of which cases were approved and followed by the House of Lords in *Hollins v. Fowler*, *supra*; and see *England v. Cowley*, L. R. 8 Ex. 126.

§ 276. [This case was carried on appeal to the House of Lords,¹ and the judges were summoned. Of the learned judges who attended, the majority (Blackburn, Mellor, and Grove, JJ., and Cleasby B.) were in favor of affirming the decision of the Courts below, while Brett J. again delivered a dissentient opinion, in which Amphlett B. concurred. Their lordships unanimously affirmed the judgments of the Court of Queen's Bench and of the Exchequer Chamber. Some difficulty arose in considering the effect which ought to be given to the findings of the jury at the trial. The jury had found, as we have already seen, that the cotton was bought by the defendants *as agents in the course of their business as brokers*, and that they had dealt with it only as agents to their principals. In point of fact the defendants had no principals at the time when they purchased the goods, although they intended them for Micholls & Co.; but it was only after the completion of the contract that Micholls & Co. adopted it. There was evidence at the trial that in the course of their business, as brokers, the defendants purchased cotton in the expectation of being able to find a client to take it off their hands, although they never intended to retain the goods as principals, but to pass them on to the purchaser when found, receiving their brokers' commission on the sale. All their lordships explained the findings of the jury with regard to this course of dealing,² and held that as the defendants had at the time of the sale assumed the responsibility of principals, they had by the transfer of the goods to Micholls & Co., exercised an act of dominion over them which was inconsistent with the right of the plaintiffs, the true owners, to whom therefore they were liable for conversion.³

[*210] * Lord Cairns says (at p. 797), "I agree with what is said by Mr. Justice Grove, that the jurors appear to have meant that the appellants never bought intending

¹ L. R. 7 H. L. 757; reported *sub nom.* Hollins v. Fowler.

² *Per* Lord Chelmsford, at p. 794; *per* Lord Cairns, at p. 796; *per* Lord

Hatherley, at p. 798; *per* Lord O'Hagan, at p. 800.

³ See *Koch v. Branch*, 44 Mo. 542; *Pease v. Smith*, 61 N. Y. 477; *Hoffman v. Carow*, 22 Wend. (N. Y.) 285.

to hold or to make a profit, but with a view to pass the goods over to Micholls & Co., or, if Micholls & Co. did not accept them, to some other customer, and that therefore, in one sense, they acted as agents to principals, only intending to receive their commission as brokers, and never thinking of retaining the goods, or dealing with them as buyers and sellers. But, as Mr. Justice Grove continues, 'this would leave the question untouched, whether they did not exercise a volition with respect to the dominion over the goods, and whether, although they intended to act and did act, in one respect, as brokers, not making a profit by re-sale, but only getting brokers' commission, they did not intend to act and did not act, in relation to the sellers, in a character beyond mere intermediates, and not as mere conduit pipes.' In my opinion they did act, in relation to the sellers, in a character beyond that of mere agents; they exercised a volition in favor of Micholls & Co., the result of which was that they transferred the dominion over and property in the goods to Micholls, in order that Micholls might dispose of them as their own; and this, as I think, within all the authorities, amounted to a conversion."

It should be remarked, in regard to the judgment of Brett J., delivered in the Exchequer Chamber, that although their lordships differed from that learned judge in the interpretation which they put upon the findings of the jury, the effect of their decisions in no way goes to detract from the value of that judgment as an exposition of the law as to brokers' liabilities.]

§ 277. Where a party contracts in writing as agent for a non-existent principal he will be personally bound, and no subsequent ratification by the principal afterwards coming into existence can change this liability, nor is evidence admissible to show that a personal liability was not intended. Thus in *Kelner v. Baxter*,¹ the plaintiff wrote to the three *defendants, addressing them "on [*211] behalf of the proposed Gravesend Royal Alexandra Hotel Company Limited," proposing to sell certain goods

¹ L. R. 2 C. P. 174. See also *Scott v. Lord Ebury*, L. R. 2 C. P. 255.

for 900l., which offer the defendants accepted by a letter signed by themselves, "on behalf of the Gravesend Royal Alexandra Hotel Company Limited," and the goods were thereupon delivered and consumed by the company, which was not incorporated till after the date of the contract, and which ratified the purchase made on its behalf. It was held that the defendants were personally liable because there was no principal existing at the date of the contract, for whom they could by possibility be agents, and that for the same reason no ratification was possible: that the company might have bound itself by a *new* contract to buy and pay for the goods, but such new contract would require the assent of the vendor, who could not be deprived of his recourse against those who dealt with him by any action of the company to which he was no party: and that parol evidence was not admissible to affect the inferences legally resulting from the written contract.²

§ 278. We now come to the second point of the inquiry, and must consider to what extent it is necessary that the writing should contain the terms and subject-matter of the contract, in order to be deemed a sufficient note or memorandum "of the bargain."¹

² *An agent contracting in the name of a non-existent or fictitious principal will be personally liable on his contract.* New York & N. H. R. R. v. Ketchum, 27 Conn. 170; Rockford, R. I. & St. L. R. R. v. Sage, 85 Ill. 328; Woodbury v. Wolff, 18 Iowa, 572; Allen v. Pegram, 16 Iowa, 163, 171; Booth v. Wonderly, 36 N. J. L. (7 Vr.) 250, 255.

However, where an agent made a contract for a corporation which at the date of the contract had not filed its articles of incorporation as required by the statute but subsequently ratified the contract by recognizing and treating it as valid, held that the agent would not be personally liable on the contract thus made. Whitney v. Wyman, 101 U. S. (11 Otto) 392; bk. 25, L. ed. 105.

¹ *The memorandum need not be in any particular form to make it valid.* Vide ante, § 248, note 4. See, also, Ellis v. Deadman, 4 Bibb. (Ky.) 467; Hurley v. Brown, 98 Mass. 546; Codrington v. Goddard, 82 Mass. (16 Gray) 443, 444; Tallman v. Franklin, 14 N. Y. 584; Drake v. Seaman, 27 Hun (N. Y.) 63; Bailey v. Ogdens, 3 John. (N. Y.) 399; s. c. 3 Am. Dec. 509; Salmon Falls Manuf. Co. v. Goddard, 55 U. S. (14 How.) 446; bk. 14, L. ed. 493; Harry v. Coombe, 26 U. S. (1 Pet.) 651; bk. 7, L. ed. 300; Reeves v. Pye, 1 Cr. C. C. 219; Smith v. Arnold, 5 Mason C. C. 416; Frazier v. Howe, Chicago Leg. News, 1883, p. 296; DeBeil v. Thomson, 3 Beav. 469; 1 Sugden V. & P. 140, note (d); provided only it shows the parties to the transaction and the

[In *Mahalen v. Dublin and Chapelized Distillery Company*,² there was a parol agreement for the purchase of whiskey, the purchaser to have the option of paying in cash or by his acceptance at four months, and the exact quantity of the whiskey was to be ascertained by redip. Invoices were made out which represented the sale to be for "net cash," and of an ascertained quantity of whiskey. It was held, by the Court of Queen's Bench in Ireland, that the invoices did not contain the substantial and material terms of the bargain within the meaning of the statute.³]

§ 279. *It has already been seen that the decisions [*212] establish the necessity under the fourth section of proving the whole "agreement" in writing, in order to satisfy the statute. Independently of authority, one would think that "bargain" and "agreement" are words so identical in meaning, when applied to a contract for the sale of goods, as to admit of no possible distinction; but the authorities do nevertheless distinguish them in a manner too plain to permit a doubt as to the law.¹

§ 280. In *Egerton v. Mathews*,¹ the plaintiff had been non-suited at Guildhall, by Lord Ellenborough, on the authority of *Wain v. Warlters*.² The writing was "We agree to give

terms to the sale. *McConnell v. Brillhart*, 17 Ill. 354; *Ridgway v. Ingram*, 50 Ind. 145; s. c. 19 Am. Rep. 706; *Norris v. Blair*, 39 Ind. 90, 94; s. c. 10 Am. Rep. 135; *Barickman v. Kuykendall*, 6 Blackf. (Ind.) 21; *Kay v. Curd*, 6 B. Mon. (Ky.) 100; *Sanborn v. Flagler*, 91 Mass. (9 Allen) 476, 477; *Coddington v. Goddard*, 82 Mass. (16 Gray) 442-444; *Chase v. Lowell*, 73 Mass. (7 Gray) 33; *Atwood v. Cobb*, 33 Mass. (16 Pick.) 230; *Packard v. Richardson*, 17 Mass. 122, 130, 131; s. c. 9 Am. Dec. 123; *Johnson v. Buck*, 35 N. J. L. (6 Vr.) 343; s. c. 10 Am. Rep. 243; *Davis v. Shields*, 26 Wend. (N. Y.) 341; *Ives v. Hazard*, 4 R. L. 14; s. c. 67 Am. Dec. 500; *Mingaye v. Corbett*, 14 Up. Can. C. P. 557; *Mahalen v. Dublin & Chapelized*

Distillery Co., 11 Ir. C. L. 83; *McClellan v. Nicolle*, 4 L. T. (N. S.) 863.

² 11 Ir. C. L. 83.

³ The 13th section of the Irish Statute of Frauds (7 Will. 3, c. 12) is similar in its terms to the 17th section of the English act.

¹ There is a recognized distinction between an "agreement" and "bargain." *Williams v. Robinson*, 73 Me. 186; s. c. 40 Am. Rep. 352; *Packard v. Richardson*, 17 Mass. 143; s. c. 9 Am. Dec. 123; *Hunt v. Adams*, 5 Mass. 358, 361; *Leonard v. Vredenburg*, 8 Johns. (N. Y.) 29; s. c. 5 Am. Dec. 317; *Sears v. Brink*, 3 Johns. (N. Y.) 211; s. c. 8 Am. Dec. 475.

¹ 6 East, 307.

² 5 East, 10.

Mr. Egerton 19*d.* per pound for thirty bales of Smyrna cotton, customary allowance, cash three per cent., as soon as our certificate is complete." It was signed and dated.

Lord Ellenborough is reported, when granting a rule *nisi*, to have assented to a distinction between the two cases, and to have said on cause shown, "This was a memorandum of the bargain, or at least of so much of it as was sufficient to bind the parties to be charged therewith, and whose signature to it is all that the statute requires." This last expression would seem to indicate that the difficulty in his lordship's mind was, that the bargain was not complete because the plaintiff had not signed (a point not fully settled by authority, till 1836, in *Laythorp v. Bryant*,³ as will be seen hereafter⁴). But Lawrence J. said "The case of *Wain v. Warlters* proceeded on this, that in order to charge one man with the debt of another, the *agreement* must be in writing, which word *agreement* we considered as properly including the *consideration* moving to, as well as the promise made by, the party to be so charged." The learned judge, however, did not explain why the word "bargain" does not also include the terms on both sides, as was observed by Holroyd J. when he said: "It appears to me that you cannot call that

a memorandum of a bargain, which does not contain [*213] the terms of it;" and by Bayley J. when he *held in the same case⁵ that the language of the two sections of the statute was in substance the same, and that the word "*bargain*" means "the terms upon which parties contract."⁶

In *Hinde v. Whitehouse*,⁷ the memorandum consisted of the auctioneer's catalogue, signed by him as agent of both parties, showing the goods sold, their marks, weight, and price; but the Court held this insufficient, because there was another paper containing the conditions of the sale, which had been read, but was not made a part of the writ-

³ 2 Bing. N. C. 735.

⁴ *Post*, p. 219.

⁵ *Kenworthy v. Schofield*, 2 B. & C. 948.

⁶ *Salmon Falls Manuf. Co. v.*

Goddard, U. S. (14 How.) 446, 454; bk. 14, L. ed. 493.

⁷ *East*, 558; see also *Peirce v. Corf*, L. R. 9 Q. B. 210, *ante*, p. 191;

Rishton v. Whatmore, 8 Ch. D. 467.

ten note of the bargain by internal evidence contained in the signed paper.

In *Laythoarp v. Bryant*,⁸ in 1836, which was on the 4th section, Tindal C. J. said: “*Wain v. Warlters* was decided on the express ground that an agreement under the 4th section imports more than a bargain under the 17th.” Park J. said: “The cases on the 17th section of the statute might very much be put out of question, because the language of that section is different from the language of the 4th.”

In *Sarl v. Bourdillon*,⁹ the written note was for the sale of “*candlesticks, complete*.” It was proven that the parol bargain was that the candlesticks should be furnished with a gallery to carry a shade, and defendant insisted that the written note was insufficient; but after time to consider, the decision of the Court was delivered by Cresswell J., who said: “We do not feel obliged to yield to this argument. The memorandum states all that *was to be done by the person charged*, viz. the defendant, and according to the case of *Egerton v. Mathews*,¹⁰ that is *sufficient to satisfy the 17th section of the Statute of Frauds, though not to make a valid agreement in cases within the 4th section*.”

§ 281. In *Elmore v. Kingscote*,¹ there had been a verbal sale of a horse for 200 guineas, but the only writing was a letter from defendant to plaintiff in the follow- [*214] ing words: “Mr. Kingscote begs to inform Mr. Elmore that if the horse can be proved to be five years old on the 13th of this month in a perfectly satisfactory manner, of course he shall be most happy to take him: and if not most clearly proved Mr. K. will most decidedly have nothing to do with him.” The Court held this insufficient, saying, “The price agreed to be paid constituted a material part of the bargain.”

In *Ashcroft v. Morrin*,² defendant ordered certain goods to be sent him, saying “Let the quality be fresh and good, and on moderate terms.” On objection made that the price

⁸ 2 Bing. N. C. 735.

⁹ 28 L. J. C. P. 78; 1 C. B. N. S.

188.

¹⁰ 6 East, 307.

¹ 5 B. & C. 583.

² 4 M. & G. 450.

was not stated, the Court said: "The order is to send certain quantities of porter and other malt liquor, on moderate terms. Why is not that sufficient? That is the contract between the parties:" and set aside the nonsuit according to leave reserved.

In *Acebal v. Levy*,³ there was a special count alleging an agreement for the sale of a cargo of "nuts, at the then shipping price at Gijon, in Spain," and the parol evidence was to that effect. Plaintiff not being successful in establishing the validity of the contract by satisfactory proof of delivery and acceptance, then attempted to support his case by a letter which did not state the price, and by insisting that a contract of sale was valid without statement of price, because the law would imply a promise to pay a reasonable price. But the Court, declining to determine how this would be if no price had really been agreed on, held that where there had been an actual agreement as to price shown by parol, the written paper, which did not contain that part of the bargain, was insufficient to satisfy the statute.⁴

§ 282. In *Hoadly v. M'Laine*,¹ the same Court was called on to decide, in the ensuing term, the very point which had been left undetermined in *Acebal v. Levy*. The defendant gave plaintiff an order in these words: "Sir Archibald M'Laine orders Mr. Hoadly to build a new, fashionable, and handsome landaulet, with the following appointments, &c. . . . *the whole to be ready by the 1st of March, 1833." Nothing was said about price. The judges were all of opinion that as the writing contained *all that was agreed on*, it was a sufficient note of the bargain. Tindal C. J. said: "This is a contract which is silent as to price, and the parties therefore leave it to the law to ascertain what the commodity contracted for is reasonably worth." Park J. said: "It is only necessary that price should be mentioned, *when price is one of the ingredients of the bargain* . . . and it is admitted on all hands that if a specific

³ 10 Bing. 376; and see *Jeffcott v. North British Oil Company*, 8 Ir. R. C. L. 17.

⁴ *James v. Muir*, 33 Mich. 223;

Mahalen v. Dublin & C. D. Co., 11 Ir. C. L. 83; *Jeffcott v. No. Br. Oil Co.*, 8 Ir. C. L. 17.

¹ 10 Bing. 482.

price be agreed on, and that price is omitted in the memorandum, the memorandum is insufficient."

In *Goodman v. Griffiths*,² the plaintiff showed defendant an invoice of his prices, and then agreed verbally to sell to him at a deduction of twenty-five per cent. on those prices for cash, whereupon defendant wrote an order: "Please to put to my account four mechanical binders," and signed it. Held, that as there had been a parol agreement as to price, which was not included in the note of the bargain, the statute was not satisfied.

§ 283. It is plainly deducible from the foregoing decisions, that so far as price is concerned, the rule of law is, that where there is no actual agreement as to price, the note of the bargain is sufficient, even though silent as to the price, because the law supplies the deficiency by importing into the bargain a promise by the buyer to pay a reasonable price. But the law only does this in the absence of an agreement, and therefore, where the price is fixed by mutual consent, that price is part of the bargain, and must be shown in writing in order to satisfy the statute; and, finally, that parol evidence is admissible to show that a price was actually agreed on, in order to establish the insufficiency of a memorandum which is silent as to price.¹

² 26 L. J. Ex. 145, and 1 H. & N. 574.

¹ *The memorandum should contain the terms of the contract and give the price for which the property was sold. Vide ante, sec. 248, note 1. See also Nichols v. Johnson, 10 Conn. 192; Norris v. Blair, 39 Ind. 90; s. c. 10 Am. Rep. 135; Kay v. Curd, 6 B. Mon. (Ky.) 100; Washington Ice Co. v. Webster, 62 Me. 341; s. c. 16 Am. Rep. 462; O'Donnell v. Lee-man, 43 Me. 158, 160; s. c. 69 Am. Dec. 54; Sanborn v. Flagler, 91 Mass. (9 Allen) 474; Waterman v. Meigs, 58 Mass. (4 Cush.) 497; Morton v. Dean, 54 Mass. (13 Metc.) 385; Johnson v. Buck, 35 N. J. L. (6 Vr.) 338, 343; s. c. 10 Am. Rep. 243; Tallman v. Franklin, 14 N. Y. 584;*

Sale v. Darragh, 2 Hilt. (N. Y.) 184; Bailey v. Ogdens, 3 Johns. (N. Y.) 399; s. c. 8 Am. Dec. 609; Soles v. Hickman, 20 Pa. St. 180, 183; Harvey v. Stevens, 43 Vt. 656; Buck v. Pickwell, 27 Vt. 167; Salmon Falls Manuf. Co. v. Goddard, 55 U. S. (14 How.) 446, 455; bk. 14, L. ed. 493; 2 Kent Com. 511. A contract providing that the price shall be fixed by appraisers or other method will be sufficient to satisfy the statute. Norton v. Gale, 95 Ill. 533, 538; s. c. 35 Am. Rep. 173; Kay v. Curd, 6 B. Mon. (Ky.) 100, 103; Atwood v. Cobb, 33 Mass. (16 Pick.) 227; Whipple v. Parker, 29 Mich. 369, 373; Carr v. Passaic, L. I. & B. Co., 19 N. J. Eq. (4 C. E. Gr.) 424; Stone v. Browning, 68 N. Y. 598; Newbery

§ 284. As to the other terms of the contract, it is necessary that they should so appear by the written papers as to enable the Court to understand what they actually were, in order to satisfy the statute.

[*216] § 285. *It has already been shown that where these terms are contained in different pieces of paper, the several writings which are offered as constituting the bargain must be consistent, and not contradictory.¹ In *Jackson v. Lowe*,² and *Allen v. Bennett*,³ the different writings were held consistent, so as to form a sufficient memorandum while the reverse was held as to the written evidence offered in *Cooper v. Smith*,⁴ *Richards v. Porter*,⁵ *Smith v. Surman*,⁶ and *Archer v. Baynes*.⁷

In *Thornton v. Kempster*,⁸ the broker's bought note described the article bought as "sound and merchantable Riga Rhine hemp," and the sold note as "St. Petersburg clean hemp," the former description being of an article materially different in quality and value from the latter. Held, that the *substance of the contract* was not shown by the written bargain evidenced by two papers that materially varied from each other.

In *Archer v. Baynes*,⁷ the Court held the correspondence between the parties an insufficient note of the bargain, because not containing all the terms of the contract. The

v. Wall, 65 N. Y. 484; *Soles v. Hickman*, 20 Pa. St. 180; *Thomas v. Hammond*, 47 Tex. 42; *Parry v. Spikes*, 49 Wis. 384. But the price must be stated in such a manner as to be certain, and it will be sufficient if stated in figures or letters, provided only it is intelligible and clearly indicates the price or consideration. *Adams v. McMillan*, 7 Port. (Ala.) 73; *Gowen v. Klous*, 101 Mass. 449, 454; *Atwood v. Cobb*, 33 Mass. (16 Pick.) 227; *Bird v. Richardson*, 25 Mass. (8 Pick.) 252; *Carr v. Passaic L. I. & B. Co.*, 19 N. J. Eq. (4 C. E. Gr.) 424; *Langston v. Nicholson*, 25 Brewst. (Pa.) 16; *Meadows v. Meadows*, 3 McC. (S. C.) L. 458; s. c. 15 Am. Dec. 645; *Ide v.*

Stanton, 15 Vt. 685; s. c. 40 Am. Dec. 698; *Johnson v. Ronald*, 4 Munf. (Va.) 77; *Salmon Falls Manuf. Co. v. Goddard*, 55 U. S. (14 How.) 446; bk. 14, L. ed. 493; *Smith v. Arnold*, 5 Mason C. C. 414; *Spicer v. Cooper*, 1 Q. B. 424; see *ante*, § 248, note 1.

¹ *Ante*, p. 186.

² 1 Bing. 9.

³ 3 Taunt. 169.

⁴ 15 East, 103.

⁵ 6 B. & C. 437.

⁶ 9 B. & C. 561.

⁷ 5 Ex. 625; 20 L. J. Ex. 54; *Haughton v. Morton*, 5 Ir. C. L. 329.

⁸ 5 Taunt. 786.

Court say of the defendant: "It is clear, from the letters, that he had bought the flour from the plaintiff upon some contract or other, but whether he had bought it on a contract that he should take the particular barrels of flour which he had seen at the warehouse, or whether he had bought them on a sample which had been delivered to him on the condition that they should agree with that sample, does not appear; and that which is in truth the dispute between the parties does not appear to be settled by the contract in writing."

In *Valpy v. Gibson*,⁹ in which the Statute of Frauds was not in question, it was contended on behalf of the plaintiffs that the terms of the contract did not appear, because the mode and time of payment had not been specified.

*But the Court said: "The omission of the particular mode or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale. Goods may be sold and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify the price or the mode of payment, leaving them to be settled by some future agreement, or to be determined by what is reasonable under the circumstances."¹⁰ And the Court held, in the case before it, that the contract between the parties was one of the nature above described, and was valid.

§ 286. It was decided in the Common Pleas in opposition to the intimation of opinion in *Blackburn on Sales*,¹ that a

⁹ 4 C. B. 835.

¹⁰ When no time or place is named in a contract for the delivery, the goods are to be delivered in a reasonable time after the sale at the buyer's place of business or at his usual place of delivery. *Adams v. Adams*, 26 Ala. 272; *Atkinson v. Brown*, 20 Me. 67; *Sawyer v. Hammatt*, 15 Me. 350; *Warren v. Wheeler*, 49 Mass. (8 Metc.) 97; *Atwood v. Cobb*, 33 Mass. (16 Pick.) 231; *Cameron v. Wells*, 30 Vt. 633; *Salmon Falls Manuf. Co. v. Goddard*, 55 U. S. (14

How.) 446, 455, bk. 14, L. ed. 496; *Cocker v. Franklin, H. & F. M. Co.*, 3 Sumn. C. C. 530; *Greaves v. Ashlin*, 3 Camp. 426.

¹ Page 66. In *Buxton v. Rust*, (in Ex. Ch.) L. R. 7 Ex. at p. 282, *Blackburn J.* stated that the point in question had been settled by the decisions of the Common Pleas in *Bailey v. Sweeting*, and *Wilkinson v. Evans*, *supra*, and assented to the rule as there laid down, as being, in his opinion, as logical and more convenient than that suggested by himself.

letter repudiating a contract may be so worded as to furnish a sufficient note of the bargain to satisfy the 17th section.² In *Bailey v. Sweeting*,³ the letter produced was as follows: "In reply to your letter of the 1st instant, I beg to say that the only parcel of goods selected for ready money was the chimney-glasses, amounting to 38*l.* 10*s.* 6*d.*, which goods I have never received, and have long since declined to have, for reasons made known by you at the time, &c., &c." Erle C. J., in his opinion, said the letter "in effect says this to the plaintiff: 'I made a bargain with you for the purchase of chimney-glasses at the sum of 38*l.* 10*s.* 6*d.*, but I decline to have them because the carrier broke them.' Now the first part of the letter is unquestionably a note or memorandum of the bargain. It contains the price and all the substance of the contract, and there could be no dispute that if it had stopped there, it would have been a good memorandum of the contract within the meaning of the statute." The learned Chief Justice then referred to the passage from *Blackburn on Sales*, and declared his inability to assent to it, and in this the other judges, Williams, Willes, and Keating, concurred.⁴

[*218] * In *Wilkinson v. Evans*,⁵ the defendant also refused the goods, writing on the back of the invoice: "The cheese came to-day, but I did not take them in, for they were very badly crushed; so the candles and the cheese is returned." Held, that this was evidence for the jury that the invoice contained all the stipulations of the contract, and that defendant's objection was not to the plaintiff's statement of the contract, but related to the performance of it. Nonsuit set aside.

² *Townsend v. Hargraves*, 118 Mass. 325, 335; *Johnson v. Trinity Church*, 93 Mass. (11 Allen) 123; *Stone v. Browning*, 68 N. Y. 598, 604; *Newbury v. Wall*, 65 N. Y. 484.

Letter admitting and one denying contract.—A distinction is made in the decisions between a letter admitting a contract and one denying its existence; in the former case the letter is evidence of the contract, and

the latter not. *Caulkins v. Hellman*, 47 N. Y. 449, 456; s. c. 7 Am. Rep. 461.

³ 30 L. J. C. P. 150; 9 C. B. N. S. 843.

⁴ See *ante*, p. 190, remarks on *Richards v. Porter*.

⁵ L. R. 1 C. P. 408; 35 L. J. C. P. 224. See *Leather Cloth Co. v. Hieronimus*, L. R. 10 Q. B. 140; *Buxton v. Rust*, L. R. 7 Ex. 279.

[In the *Leather Cloth Company v. Hieronimus*,⁶ the defendant wrote a letter admitting the purchase, and referred to the plaintiff's letter containing the invoice, but repudiated any liability because the goods had been sent by a wrong route, and it was held that there was a sufficient note of the bargain to satisfy the 17th section.]

§ 287. A note or memorandum of the bargain is sufficient, although it contain a mere proposal, if supplemented by parol proof of acceptance.¹ This had been held, by Kindersley V.-C., in *Warner v. Willington*,² and that case was followed by the Court of Common Pleas, in *Smith v. Neale*,³ and by the Exchequer, in *Liverpool Borough Bank v. Eccles*.⁴ The question came before the Exchequer Chamber in *Reuss v. Picksley*,⁵ and after full argument, the judges, six in number, unanimously confirmed the cases just cited, and expressed their approval of the reasoning of the Vice-Chancellor in *Warner v. Willington*.⁶

§ 288. In the United States it has been held that if terms of credit have been agreed on, or a time for performance

⁶ L. R. 10 Q. B. 140.

¹ *Where a person makes a written proposition to sell or purchase, he will be bound by an oral acceptance of such proposition. See Williams v. Robinson*, 73 Me. 186; s. c. 40 Am. Rep. 352; *Sanborn v. Flagler*, 91 Mass. (9 Allen) 474; *Lang v. McLaughlin*, 14 Minn. 72; *Mason v. Decker*, 72 N. Y. 595, 598; *Justice v. Lang*, 42 N. Y. 493; s. c. 1 Am. Rep. 576; *Napier v. French*, 40 N. Y. Super. Ct. (8 J. & S.) 122; *Thompson v. Menck*, 2 Keyes (N. Y.) 86; *Ives v. Hazard*, 4 R. I. 14; s. c. 67 Am. Dec. 500.

An oral acceptance of a written offer may be shown by parol evidence. Lincoln v. Erie Preserving Co., 132 Mass. 130; *Sanborn v. Flagler*, 91 Mass. (9 Allen) 566; *Smith v. Gowdy*, 90 Mass. (8 Allen) 566. But see *contra*, *Washington Ice Co. v.*

Webster, 62 Me. 341; s. c. 16 Am. Rep. 462.

² 3 Drew. 523, and 25 L. J. Ch. 662; and see *Clarke v. Gardiner*, 12 Ir. C. L. R. 472.

³ 2 C. B. N. S. 67, and 26 L. J. C. P. 143.

⁴ 4 H. & N. 139; 28 L. J. Ex. 123.

⁵ L. R. 1 Ex. 342; 35 L. J. Ex. 218.

⁶ *Norris v. Blair*, 39 Ind. 90; s. c. 10 Am. Rep. 135; *Boardman v. Spooner*, 95 Mass. (13 Allen) 353; *Coddington v. Goddard*, 82 Mass. (16 Gray) 436; *McElroy v. Buck*, 35 Mich. 434; *O'Neil v. Crain*, 67 Mo. 250; *Fisher v. Kuhn*, 54 Miss. 480; *McFarson's Appeal*, 11 Pa. St. 503; *Johnson v. Granger*, 57 Tex. 42; *Mingaye v. Corbett*, 14 Up. Can. C. P. 557.

fixed by the bargain, the memorandum will be insufficient if these parts of the bargain be omitted.¹

¹ *Davis v. Shields*, 28 Wend. 54 Mass. (13 Metc.) 388; *Soles v. (N. Y.)* 341; *Salmon Falls Company* Hickman, 20 Pa. St. 180; *Buck v. v. Goddard*, 55 U. S. (14 How.) 446; *Pickwell*, 27 Vt. 167; *Elfe v. Gadsden*, bk. 14, L. ed. 493; *Morton v. Dean*, 2 Rich. (S. C.) 373.

*CHAPTER VII.

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OF THE SIGNATURE OF THE PARTY.

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§ 289. THE 17th section requires the writing to be "signed by the *parties* to be charged," &c., and the 4th section, "by the *party* to be charged," &c. Under both sections it is well settled that the only signature required is that of the party *against* whom the contract is to be enforced. The contract, by the effect of the decisions, is good or not at the election of the party who has not signed.¹

¹ *Signature to the memorandum.*—The statute requires the signature of the party to be charged as distinguished from the party seeking to enforce the contract. *Adams v. McMillan*, 7 Port. (Ala.) 73; *Perkins v. Hadsell*, 60 Ill. 217; *Newby v. Rogers*, 40 Ind. 9, 11, 12; *Cook v. Anderson*, 20 Ind. 15; *Smith v. Smith*, 8 Blackf. (Ind.) 208; *Shirley v. Shirley*, 7 Blackf. (Ind.) 152; *Higdon v. Thomas*, 1 Harr. & G. (Md.) 139; *Williams v. Robinson*, 73 Me. 186; s. c. 40 Am. Rep. 352; *Barstow v. Gray*, 3 Me. (3 Greenl.) 409; *Getchell v. Jewett*, 4 Me. (4 Greenl.) 350; *Dresel v. Jordan*, 104 Mass. 412; *Hunter v. Giddings*, 97 Mass. 41; *Old Colony R. R.*

Co. v. Evans, 72 Mass. (6 Gray) 31; s. c. 66 Am. Dec. 394; *Penniman v. Hartshorn*, 13 Mass. 87; *Lent v. Padelford*, 10 Mass. 236; s. c. 6 Am. Dec. 119; *Hawkins v. Chace*, 36 Mass. (19 Pick.) 502; *Old Colony R. R. Co. v. Evans*, 72 Mass. (6 Gray) 25; s. c. 66 Am. Dec. 394; *Sanborn v. Flagler*, 91 Mass. (9 Allen) 474; *Ivory v. Murphy*, 36 Mo. 534; *Gartrell v. Stafford*, 12 Neb. 545; *Laning v. Cole*, 4 N. J. Eq. (3 C. E. Gr.) 229; *Young v. Paul*, 10 N. J. Eq. (2 Stockt.) 402; s. c. 64 Am. Dec. 455; *Mason v. Decker*, 72 N. Y. 595; *Justice v. Lang*, 52 N. Y. 323; s. c. 42 N. Y. 493; 1 Am. Rep. 576; *Worrall v. Munn*, 5 N. Y. 229; s. c. 15 Am.

In *Allen v. Bennett*,² in 1810, the Court of Common Pleas considered the question as already settled under the 17th section by authority and practice. And in *Thornton v. Kempster*,³ the same Court declared that contracts may subsist which, by reason of the Statute of Frauds, could be enforced by one party, though not by the other.

In *Laythoarp v. Bryant*,⁴ the point was decided under the 4th section, after full argument.

The foregoing decisions have never since been questioned, and the law on the subject is settled not only by them, but by the more recent case of *Reuss v. Picksley*,⁵ in the Exchequer Chamber, and the decisions quoted *ante*, p. 218, in which it was held that a written proposal, signed by [*220] the party *to be charged, was a sufficient note of the bargain, if supplemented by parol proof of acceptance by the other party.⁶

Dec. 330; *Clasen v. Bailey*, 14 Johns. (N. Y.) 484; *Ballard v. Walker*, 3 John. Cas. (N. Y.) 60; *Fenly v. Stewart*, 5 Sandf. (N. Y.) 101; *Davis v. Shields*, 26 Wend. (N. Y.) 341; *Smith's Appeal*, 69 Pa. St. 480; *Tripp v. Bishop*, 56 Pa. St. 428; *Farson's Appeal*, 11 Pa. St. 503; *Lowry v. McMehaffy*, 19 Watts. (Pa.) 387; *Douglass v. Spears*, 2 Nott. & McC. (S. C.) 207; s. c. 10 Am. Dec. 588; *DeCordova v. Smith*, 9 Tex. 129; *Ide v. Stanton*, 15 Vt. 687; s. c. 40 Am. Dec. 698; *Lowber v. Connit*, 36 Wis. 176; *Allen v. Bennet*, 3 Taunt. 169; 2 Kent Com. 510; *Story on Sales*, § 266; *Lang. Cas. on Sales*, 350, 493; 2 Stark. Ev. 614; *Newmarket on Sales*, § 291. However, some of the authorities hold that where the memorandum is signed by one party only it is not sufficient because of a want of mutuality. *Stiles v. McClellan*, 6 Colo. 89; *Krohn v. Bantz*, 68 Ind. 277; *Lees v. Whitcomb*, 3 Car. & P. 289; *Sykes v. Dixon*, 9 Ad. & El. 693; s. c. 36 Eng. C. L. 244. And see also as bearing upon the question, *Wilkinson v. Heavenrick*, 58 Mich. 574; *McDonald v. Bewick*, 51 Mich. 79;

Liddle v. Needham, 39 Mich. 147; s. c. 33 Am. Rep. 359; *Scott v. Bush*, 26 Mich. 418; s. c. 12 Am. Rep. 311; *Hall v. Soule*, 11 Mich. 496. The cases above cited are not intended to be exhaustive on either side of the proposition.

² 3 Taunt. 169.

³ 5 Taunt. 786.

⁴ 2 Bing. N. C. 735, and 3 Scott, 238.

⁵ L. R. 1 Ex. 342; 35 L. J. Ex. 218.

⁶ See *Rutenberg v. Main*, 47 Cal. 213; *Groover v. Warfield*, 50 Ga. 644, 653; *Newby v. Rogers*, 40 Ind. 9; *Hunter v. Giddings*, 97 Mass. 41; *Dresel v. Jordan*, 104 Mass. 407; *Morin v. Martz*, 13 Minn. 191; *Wemple v. Knopf*, 15 Minn. 440; s. c. 2 Am. Rep. 147; *Marqueze v. Caldwell*, 48 Miss. 23; *Ivory v. Murphy*, 36 Mo. 534; *Cartzell v. Stafford*, 12 Neb. 545, 552; *Mason v. Decker*, 72 N. Y. 595, 598; *Dykens v. Townsend*, 24 N. Y. 57; *Steele v. Taft*, 22 Hun (N. Y.) 453; *Clasen v. Bailey*, 14 Johns. (N. Y.) 484, 487; *Thayer v. Luce*, 22 Ohio St. 62; *McFarson's Appeal*, 11 Pa. St. 503;

§ 290. The signature required by the statute is not confined to the actual subscription of his name by the party to be charged.

Thus, a mark made by a party as his signature is sufficient, if so intended. And in *Baker v. Dening*,¹ where the question arose under the 5th section of the statute, which relates to wills and devises, the Court held, that it was not necessary to show that the party signing by a mark was unable to write his name: and the judges expressed the opinion, that a mark would be a good signature even if the party signing was able to write his name.

In *Helshaw v. Langley*,² the signature of a party was decided to be sufficient, when he, being unable to write, held the top of the pen, while another person wrote his signature.

§ 291. But still there must be a signature, or a mark intended as such; and a description of the signer, though written by himself at the foot of the paper, is insufficient. Thus, a letter by a mother to her son, beginning, "My dear Robert," and ending, "Your affectionate mother," with a full direction containing the son's name and address, was held not a sufficient signature by the mother.¹

Lowber v. Connit, 36 Wis. 176, 182; *Weightman v. Caldwell*, 17 U. S. (4 Wheat.) 85; bk. 4, L. ed. 520.

¹ 8 A. & E. 94. See, also, *Harrison v. Elving*, 3 Q. B. 117.

² 11 L. J. Ch. 17.

¹ *Selby v. Selby*, 3 Meriv. 2.

Signature by agent is sufficient. *Palmer v. Stephens*, 1 Den. (N. Y.) 471; *The Merchant's Bank v. Spicer*, 6 Wend. (N. Y.) 443; *Schouler on Pers. Prop.* sec. 560; *Wood on Frauds*, sec. 425.

Signature with initial, with intention thereby to be bound, is as effectual as writing the name in full. *Sanborn v. Flagler*, 91 Mass. (9 Allen) 474; *Palmer v. Stephens*, 1 Den. (N. Y.) 471; *The Merchant's Bank v. Spicer*, 6 Wend. (N. Y.) 443; *Salmon Falls Manuf. Co. v. Goddard*, 55 U. S. (14 How.) 446; bk. 14, L. ed. 497; *Barry v. Coombe*, 26 U. S. (1

Pet.) 640; bk. 7, L. ed. 295; *Phillimore v. Barry*, 1 Campb. 513. And where a duly authorized agent signs by his initials merely, it will be sufficient to take the case out of the Statute of Frauds. *Salmon Falls Manuf. Co. v. Goddard*, 55 U. S. (14 How.) 446; bk. 14, L. ed. 497.

An omission of the middle name or initial of the party signing is not fatally defective, if the defendant is really the party intended. See *Gill v. Bicknell*, 56 Mass. (2 Cush.) 355; *Morton v. Dean*, 54 Mass. (13 Metc.) 385.

Signing a wrong name. — Where the note has been delivered to the payee for a valuable consideration, it will be presumed that the party signing intended to bind himself, and will be liable in an action against him in his true name, on a note upon a count alleging that he made the

§ 292. Whether a signature by initials would suffice seems not to have been decided expressly.

In *Hubert v. Moreau*,¹ the question was raised under the act 6 Geo. IV. c. 16, s. 131, which made void a promise by a bankrupt to pay a debt from which he had been discharged, unless the promise was made in writing, "signed by the bankrupt." The report states, that the letter had no name attached to it, but something that looked like an M. Best C. J. said, on looking at it: "It may be an M., or it may be a waving line; but if it be an M., I am of opinion that it is not sufficient, as the statute requires that the promise should be signed. It is not the signature of a man's name. I have no doubt upon the subject." His lordship refused [*221] * the plaintiff permission to prove by parol that the defendant usually signed in that way. Afterwards a witness was called, who stated as his opinion that the mark which was taken to be an M. was nothing but a flourish, and the plaintiff was thereupon nonsuited. The Court in banc afterwards refused a rule to set aside the nonsuit, the rule being taken on the ground that the M. was a sufficient signing, because it was the sign used by the party to denote that the instrument was his.

note in the name by which it was signed. *Grafton Bank v. Flanders*, 4 N. H. 239.

Signing a fictitious name or characters, where the party intends to bind himself, will be effective to all intent and purposes. *Fuller v. Hooper*, 69 Mass. (3 Gray) 334; *Grafton Bank v. Flanders*, 4 N. H. 239, 247; *Palmer v. Stephens*, 1 Den. (N. Y.) 471, 479; *Brown v. Butchers' and Drovers' Bank*, 6 Hill (N. Y.) 443; *Merchants' Bank v. Spicer*, 6 Wend. (N. Y.) 443; *Williamson v. Johnson*, 1 Barn. & Cres. 146; s. c. 2 D. & R. 281; *George v. Surrey*, Moo. & Mal. 516; *Gould v. Barnes*, 3 Taunt. 504. But it was held in *Bartlett v. Tucker*, 104 Mass. 336; s. c. 6 Am. Rep. 240, that where a person signs a fictitious name to a promissory note, or the name of a real person, without authority, is not

liable on the note. See *Ballou v. Talbot*, 16 Mass. 461; *Long v. Colburn*, 11 Mass. 97.

Figures or marks may be used in lieu of a proper name, and where either of them is substituted by a party intending thereby to bind himself, the signature will be binding. *Middleton v. Findla*, 25 Cal. 81; *Reichart v. Felps*, 33 Ill. 433; *State v. Richards*, 30 N. J. L. (1 Vr.) 266; *Kean v. Davis*, 21 N. J. L. (1 Zab.) 683; s. c. 47 Am. Dec. 182; *Bank v. Flanders*, 4 N. H. 239, 247; *Webber v. Davis*, 87 Mass. (5 Allen) 393, 397; *Palmer v. Stephens*, 1 Den. (N. Y.) 471; *Brown v. Butchers' and Drovers' Bank*, 6 Hill (N. Y.) 443; *Williamson v. Johnson*, 1 Barn. & C. 146.

¹ 2 C. & P. 528; 2 Kent Com. 511. See *Bickley v. Keenan*, 60 Ala. 293.

In the report of the same case, as given in 12 Moore, C. P. 216, the language of the Court, in refusing the new trial, would indicate that as a question of *fact* there was no mark appended to the writing, and placed there by the writer with the intention of making it his signature. The Chief Justice put the case as follows: "Undoubtedly the signing by a mark would satisfy the meaning of the statute, *but here there is nothing intended to denote a signature*, nor does the name of the defendant appear in any part of the letter."

§ 293. In *Sweet v. Lee*,¹ the writing was signed with the initials T. L., but in the writing were the words, "Mr. Lee," in the handwriting of the defendant, and nothing was decided as to the sufficiency of the signature. And the same observations apply to the *Nisi Prius* cases of *Phillimore v. Barry*, 1 Campb. 513, and *Jacob v. Kirk*, 2 Mood. & Rob. 221.

There seems to be no doubt that if the initials are intended as a signature by the party who writes them, this shall suffice, but not otherwise.²

§ 294. The signature may be in writing or in print,¹ (and the writing may be in pencil,² *Geary v. Physic*, 5 B. & C. 284;³ or by stamping the name, *Bennett v. Brumfitt*, L. R. 3

¹ 3 M. & G. 452.

² See remarks of Lord Westbury in *Caton v. Caton*, L. R. 2 H. L. 127, 148; *Chichester v. Cobb*, 14 L. T. N. S. 433; *Sugden V. & P.* 144 (ed. 1862).

Vide ante, § 290, note. See, also, *Sanborn v. Flagler*, 91 Mass. (9 Allen) 474, 478; *Palmer v. Stephens*, 1 Den. (N. Y.) 478; *Salmon Falls Manuf. Co. v. Goddard*, 55 U. S. (14 How.) 446; bk. 14, L. ed. 493; *Barry v. Coombe*, 26 U. S. (1 Pet.) 640; bk. 7, L. ed. 295.

³ A mark or cross intended as a signature is a sufficient signing under the Statute of Frauds, the same as in other contracts. *Bickley v. Keenan*, 60 Ala. 293; *Madison v. Zabriskie*, 11 La. 251; *Tagiasco v. Molinari*, 9 La. 512; *Zacharie v. Franklin*, 37 U. S.

(12 Pet.) 151, 162; bk. 9, L. ed. 1085. But where a name is printed or stamped, some evidence is necessary to show that it was authorized by the party as and for his signature. *Boardman v. Spooner*, 95 Mass. (13 Allen) 353; *Brayley v. Kelly*, 25 Minn. 160. *Vide infra*, note 4.

² A signature to the memorandum made with a lead pencil is sufficient. *Clason v. Bailey*, 14 Johns. (N. Y.) 484; *Merritt v. Clason*, 12 Johns. (N. Y.) 102; s. c. 7 Am. Dec. 286; *Draper v. Pattina*, 2 Speers (S. C.) 292. See, also, *ante*, § 261, note 1.

³ See *Brown v. Butchers' & Drovers' Bank*, 6 Hill (N. Y.) 443; *Clason v. Bailey*, 14 Johns. (N. Y.) 484; *Merritt v. Clason*, 12 Johns. (N. Y.) 102; s. c. 7 Am. Dec. 286; *Hicks v. Whitmore*, 12 Wend. (N. Y.)

C. P. 28;⁴ and it may be in the body of the writing, or at the beginning or end of it.⁵ But when the signature is not placed in the usual way at the foot of the written or printed paper, it becomes a question of intention, a question of fact to be determined by the other circumstances of the [*222] case, * whether the name so written or printed in the body of the instrument was appropriated by the party to the recognition of the contract.

§ 295. In *Saunderson v. Jackson*,¹ the plaintiff, on giving to the defendants an order for goods, received from them a bill of parcels. The heading of the bill was printed as follows: "London: Bought of Jackson and Hanson, distillers, No. 8, Oxford Street," and then followed in writing, "1000 gallons of gin, 1 in 5 gin, 7s., £350." There was also a letter, signed by the defendants, in which they wrote to plaintiff, about a month later, "We wish to know what time

548, 554; *McDowell v. Chambers*, 1 Strobb. (S. C.) Eq. 347; s. c. 47 Am. Dec. 537; *Draper v. Pattina*, 2 Speers (S. C.) 292.

⁴ *Signature by stamping*.—The signature to a memorandum may be by printing or stamping. If the circumstances are such as to give it a significance beyond that of an unused blank and render it equivalent to a memorandum in actual use with the name as part of it. *Hawkins v. Chase*, 36 Mass. (19 Pick.) 502; s. c. Langdells Cas. on Sales, 554; *Schneider v. Norris*, 2 Maule & S. 286; *Wood on Frauds*, sec. 412. *Vide supra*, note 1. *Boardman v. Spooner*, 95 Mass. (13 Allen), 353; *Brayley v. Kelly*, 25 Minn. 160; *Crooks v. Davis*, 6 Grant (Ont.) 317.

⁵ *Location of signature*.—The location of the name and the method of signature are not material. It is sufficient if the name appear either at the top or the bottom or in the body of the instrument where the statutes simply require a "signing." *Drury v. Young*, 58 Md. 546; s. c. 42 Am. Rep. 343; *Coddington v. Goddard*, 82

Mass. (16 Gray) 414; *Hawkins v. Chase*, 36 Mass. (19 Pick.) 502; *Peniman v. Hartshorn*, 13 Mass. 87; *Clason v. Bailey*, 14 Johns. (N. Y.) 484; s. c. Langdells Cas. on Sales, 541; *Harvey v. Stevens*, 43 Vt. 653; *Johnson v. Dodgson*, 2 Mees. & W. 653; s. c. Langdells Cas. on Sales, 413; *Allen v. Bennet*, 3 Taunt. 169; s. c. Langdells Cas. on Sales, 350; *Browne on Statutes of Frauds*, secs. 353, 358. However, the signature must be at the end of the memorandum where the statute, as in some States, departs from the usual phraseology and requires that the writing be "subscribed" instead of "signing." *James v. Patten*, 6 N. Y. 9; s. c. 55 Am. Dec. 376; *Vielie v. Osgood*, 8 Barb. (N. Y.) 130; *Davis v. Shields*, 26 Wend. (N. Y.) 341; s. c. Langdells Cas. on Sales, 558; *Knight v. Crockford*, 1 Esp. 190; *Lobb v. Stanley*, 5 Q. B. 574; *Browne on Statute of Frauds* (4th ed.).

¹ 2 B. & P. 138; *Salmon Falls Manuf. Co. v. Goddard*, 55 U. S. (14 How.) 446, 456; bk. 14, L. ed. 493, 496.

we shall send you a part of your order, and shall be obliged for a little time in delivery of the remainder. Must request you to return our pipes." Lord Eldon said: "The single question is, whether, if a man be in the habit of printing instead of writing his name, he may not be said to sign by his printed name, as well as his written name? At all events, connecting this bill of parcels with the subsequent letter of the defendants, I think the case is clearly taken out of the Statute of Frauds." Thus far the case would not amount to much as an authority on the point under discussion. His lordship went on to say: "It has been decided,² that if a man draw up an agreement in his own handwriting, beginning 'I, A. B., agree,' and leave a place for signature at the bottom, but never sign it, it may be considered as a note or memorandum in writing within the statute.³ And yet it is impossible not to see that the insertion of the name at the beginning was not intended to be a signature, and that the paper was meant to be incomplete until further signed. This last case is stronger than the one now before us, and affords an answer to the argument, that this bill of parcels was not delivered as a note or memorandum of the contract." This last sentence refers to the argument of Lens, Serjt., who admitted that the printed name might have amounted to a signature, if the bill of parcels had been *intended to express the contract, *qua* con- [*223] tract, but contended that this was not the intention.

§ 296. In *Schneider v. Norris*,¹ the circumstances were exactly the same as in the preceding case, except that the name of the plaintiff as buyer was written in the bill of parcels rendered to him in the defendant's own handwriting, and all the judges were of opinion that this was an adoption or appropriation by the defendant of the name, printed on the bill of parcels, as his signature to the contract. Lord Ellenborough said: "If this case had rested merely on the

² The case referred to by his lordship is *Knight v. Cockford*, Esp. N. P. 190. See, also, *Lobb v. Stanley*, 5 Q. B. 574, and *Durrell v. Evans*, 1 H. & C. 174, and 31 L. J. Ex. 337.

³ See *Hawkins v. Chase*, 36 Mass. (19 Pick.) 505, 506.

¹ 2 M. & S. 286.

printed name, unrecognized by and not brought home to the party, as having been printed by him or by his authority, so that the printed name had been unappropriated to the particular contract, it might have afforded some doubt, whether it would not have been intrenching upon the statute to have admitted it. But here there is a signing by the party to be charged, by words recognizing the printed name as much as if he had subscribed his mark to it, which is strictly the meaning of signing, and by that the party has incorporated and avowed the thing printed to be his: and it is the same in substance as if he had written 'Norris & Co.' with his own hand. He has, by his handwriting, in effect, said, I acknowledge what I have written to be for the purpose of exhibiting my recognition of the within contract." Le Blanc J. compared the case to one, where a party should stamp his name on a bill of parcels. Bayley J. put his opinion on the ground that the defendant had signed the plaintiff's names as purchasers, and thereby recognized his own printed name as that of the seller. And Dampier J., on much the same idea, that is, that the defendant by writing the name of the buyer on a paper in which he himself was named as the seller, recognized his name sufficiently to make it a signature.

§ 297. In *Johnson v. Dodgson*,¹ the defendant wrote the terms of the bargain in his own book, beginning with the words: "Sold John Dodgson," and required the vendor to sign the entry. The Court held this to be a signature by Dodgson, Lord Abinger saying that: "The cases have decided that though the signature be in the beginning or middle of the instrument, it is as binding as if at the foot; the question being always open to the jury whether the party not having signed it regularly at the foot meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it." Parke B. concurred, on the authority of *Saunderson v. Jackson*, and *Schneider v. Norris*, which he recognized and approved.

In *Durrell v. Evans*, in the Exchequer Chamber,² (*post*, p.

¹ 2 M. & W. 653.

² 1 H. & C. 174; 31 L. J. Ex. 337.

230) the cases of *Saunderson v. Jackson*, *Schneider v. Norris*, and *Johnson v. Dodgson* were approved and followed.³

[In *Touret v. Cripps*,⁴ under the 4th section, a letter containing proposed terms of a contract between the defendant and the plaintiff, written out by the defendant upon paper bearing a printed heading, "Memorandum from Richard L. Cripps," and *sent by him to the plaintiff*, was held to be a sufficient note in writing to charge the defendant.]

§ 298. In *Hubert v. Treherne*,¹ which arose under the 4th section, it appeared that an unincorporated company, called The Equitable Gas Light Company, accepted a tender from the plaintiff for conveying coals. A draft of agreement was prepared by the order of the directors, and a minute entered as follows: "The agreement between the company and Mr. Thomas Hubert for carrying our coals, &c., was read and approved, and a fair copy thereof directed to be forwarded to Mr. Hubert." The articles began by reciting the names of the parties, Thomas Hubert of the one part, and Treherne and others, trustees and directors, &c., of the other part; and closed, "As witness our hands." The articles were not signed by anybody, but the paper was maintained by the plaintiff to be sufficiently signed by the defendants, because the names of the defendants were written in the document by their authority. On motion to enter nonsuit, all the judges held that the instrument on its face, by the concluding words, *showed that the intention [*225] was that it should be subscribed, and that it was not the meaning of the parties that their names written in the body of the paper should operate as their signatures. Maule J. said: "The articles of agreement do not seem to me to be a memorandum signed by anybody. Before the Statute of Frauds, no one could have entertained a doubt upon that point. Since the statute, the Courts, anxious to relieve parties against injustice, have not unfrequently stretched the language of the Act. . . . If a party writes, 'I, A. B., agree, &c,' with no such conclusion as is found here, 'as wit-

³ See *Beckwith v. Talbot*, 95 U. S. (5 Otto) 289; bk. 24, L. ed. 496.

⁴ 48 L. J. Ch. 567.

¹ 3 M. & G. 743.

ness our hands,' it may be that this is a sufficient signature within the statute to bind A. B. . . . But it would be going a great deal further than any of the cases have hitherto gone to hold that this was an agreement signed by the party to be charged. This is no more than if it had been said by A. B. that he *would* sign a particular paper."

§ 299. The most full and authoritative exposition of the law on this subject is to be found in *Caton v. Caton*,¹ decided in the House of Lords in May, 1867. The paper there relied on was a memorandum of the terms of a marriage settlement, drawn up in the handwriting of the future husband, and taken to a solicitor's for execution, but the settlement was waived by the parties, and the memorandum was subsequently set up as containing the agreement. There were numerous clauses, in some of which the name "Mr. Caton" was written in the body of the paper, and in others the initials "Rev. R. B. C.," and some contained neither name nor initials. It was held that although to satisfy the Statute of Frauds it is not necessary that the signature of a party should be placed in any particular part of a written instrument, it is necessary that it should be so introduced as to govern or authenticate *every material part* of the instrument; and that where, as in the case before the Court, the name of the party, when found in the instrument, appeared in such a way that it referred in each instance only [*226] to the particular part where it was found, and not to the whole instrument, it was insufficient. The language of Lord Westbury, whose opinion on this particular point was the most comprehensive of those delivered in the case, was as follows: "What constitutes a sufficient signature has been described by different judges in different words. In the original case upon this subject, though not quite the original case, but the case most frequently referred to as of the earliest date, that of *Stokes v. Moore* (1 Cox, 219), the language of the learned judge is that the signature must authenticate every part of the instrument; or, again, that it must give authenticity to every part of the instru-

¹ L. R. 2 H. L. 127.

ment. Probably the phrases 'authentic,' and 'authenticity,' are not quite felicitous, but their meaning is plainly this, that the signature must be so placed as to show that it was intended to relate and refer to, and that in fact it does relate and refer to, every part of the instrument. The language of Sir William Grant, in *Ogilvie v. Foljambe* (3 Mer. 53), is (as his method was) much more felicitous. He says it must govern every part of the instrument. It must show that every part of the instrument emanates from the individual so signing, and that the signature was intended to have that effect. It follows, therefore, that if a signature be found in an instrument incidentally only, or having relation and reference only to a portion of the instrument, the signature cannot have that legal effect and force which it must have in order to comply with the statute, and to give authenticity to the whole of the memorandum." His lordship then criticised the different clauses of the memorandum for the purpose of showing the insufficiency of the signature when tested by these rules, and proceeded: "Now an ingenious attempt has been made at the bar to supply that defect by fastening on the antecedent words, 'In the event of marriage the undernamed parties,' and by the force of these words of reference to bring up the signature subsequently found and treat it as if it were found with the words of reference. My lords, if we adopted that device, we should entirely defeat the statute. You cannot by words of reference bring

*up a signature and give it a different signification [*227] and effect from that which the signature has in the original place in which it is found. What is contended for by this argument differs very much from the process of incorporating into a letter or memorandum signed by a party another document which is specifically referred to by the terms of the memorandum so signed, and which, by virtue of that reference, is incorporated into the body of the memorandum. There you do not alter the signature, but you apply the signature not only to the thing (writing?) originally given, but also to that which, by force of the reference, is, by the very context of the original, made a part of the original memorandum. But here you would be taking a sig-

nature intended only to have a limited and particular effect, and by force of the reference to a part of that document, you would be making it applicable to the whole of the document to which the signature in its original condition was not intended to apply, and could not, by any fair construction, be made to apply."

The effect of these principles seems to be substantially that the reference to connect two papers or two clauses so as to make one signature apply to both, must be from what is signed to what is unsigned, not the reverse.²

§ 300. [Signatures of directors to articles of association which contained a clause, in which it was stated that the plaintiff should be solicitor to the company, and should transact all the legal business of the company. were held in *Eley v. The Positive Assurance Company*,¹ not to be signatures to a memorandum of the contract within the Statute of Frauds, on the ground that they had been affixed *alio intuitu*. But in *Jones v. The Victoria Graving Dock Company*² the signature of the chairman of a company to the minutes was held to be a sufficient signature, although put *alio intuitu*, viz., to notify the proceedings of the Board under the Companies Act, 1862 (25 & 26 Vict. c. 89, s. 67). In this case, *Eley v. The Positive Assurance Company* was not cited, and the two decisions appear to be irreconcilable.

Both these cases were under the 4th section, and the [*228] reasoning upon * which the later case proceeds, viz., that the requirements of the 4th section of the statute relate only to the *evidence* of the contract,³ is undoubtedly sound. But the same reasoning would not be applicable in the case of a signature to a memorandum of a contract under the 17th section, which, as distinguished from the 4th, seems to affect the *intrinsic validity* of the class of contracts to which it refers.⁴]

² *Thayer v. Luce*, 22 Ohio St. 62.

¹ 1 Ex. D. 20.

² 2 Q. B. D. 314.

³ *Per Lush J.*, in delivering the judgment of the Court, at p. 323.

⁴ There is no conclusive authority

for this, but the distinction between the two sections was drawn in *Laythorp v. Bryant*, 2 Bing. N. C. 743; 3 Scott, 238, and in *Leroux v. Brown*, 12 C. B. 801; 22 L. J. C. P. 1, a decision which, although meeting with

some disapproval, until it is overruled, settles the law that the 4th section applies only to procedure, and therefore forms a part of the *lex fori*.

Massachusetts doctrine. — It is held by the Massachusetts Courts that the Statute of Frauds affects the remedy only, and not the validity of the con-

tract, so that the oral agreement which is within the 17th, as well as within the 4th section will be valid. See *Townsend v. Hargraves*, 118 Mass. 325; the same doctrine seems to prevail in Maine. See *Bird v. Munroe*, 66 Me. 337; s. c. 22 Am. Rep. 571.

[*229]

*CHAPTER VIII.

AGENTS DULY AUTHORIZED TO SIGN.

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§ 301. It is not within the scope of this treatise to enter into the general subject of the law of agency, which is in no way altered by the statute. The agency may be proven by

parol as at common law,¹ and may be shown by subsequent ratification as well as by antecedent delegation of authority.² * But such ratification is only possible in [*230] the case of a principal in existence when the contract was made (*ante*, p. 210).

It is necessary that the agent be a third person, and not the other contracting party.³

§ 302. The decisions as to the sufficiency of the evidence to prove authority for the agent's signature have not been numerous under the 17th section.

In *Graham v. Musson*,¹ the plaintiff's traveller, Dyson, sold sugar to the defendant, and in the defendant's presence, and at his request, entered the contract in the defendant's book in these words: "Of North & Co., thirty mats Maurs. at 71s.; cash, two months. Fenning's Wharf. (Signed) JOSEPH DYSON."

It was contended that this was a note signed by the defendant, and that Joseph Dyson was his agent for signing; but the Court held on the evidence that Dyson was the agent of the vendor, and that the request by the purchaser that the vendor's agent should sign a memorandum of the bargain was no proof of agency to sign the purchaser's name;

¹ *Yourt v. Hopkins*, 24 Ill. 326; *Johnson v. Dodge*, 17 Ill. 433; *Doty v. Wilder*, 15 Ill. 407; s. c. 60 Am. Dec. 756; *Blood v. Hardy*, 15 Me. 61; *Alna v. Plummer*, 4 Me. (4 Greenl.) 258; *Hawkins v. Chase*, 36 Mass. (19 Pick.) 502, 506; *Shaw v. Nudd*, 25 Mass. (8 Pick.) 9; *Eggleston v. Wagner*, 46 Mich. 610; *Long v. Hartwell*, 34 N. J. L. (5 Vr.) 116; *Worrall v. Munn*, 5 N. Y. 229; *Lawrence v. Taylor*, 5 Hill (N. Y.) 107, 112; *Champlin v. Parish*, 11 Paige Ch. (N. Y.) 405; *Whorton v. McMahan*, 10 Paige Ch. (N. Y.) 386; *Tomlinson v. Miller, Sheld.* (N. Y.) Super. Ct. 197; *Blacknall v. Parish*, 6 Jones (N. C.) Eq. 70; s. c. 78 Am. Dec. 239; *Heard v. Pilley*, L. R. 4 Ch. App. 548; *Rucker v. Cammeyer*, 1 Esp. 105; *Graham v. Musson*, 7 Scott,

769; *Harrison v. Jackson*, 7 T. R. 207; 1 Sugden, V. & P. (8th Am. ed.) 145, note (a).

² *Maclean v. Dunn*, 4 Bing. 722; *Gosbell v. Archer*, 2 A. & E. 500; *Acebal v. Levy*, 10 Bing. 378; *Fitzmaurice v. Bayley*, 6 E. & B. 868; afterwards reversed, 9 H. L. C. 78, but not on the point stated in the text. Sugd. V. & B. 145, ed. 1862.

³ *Bent v. Cobb*, 75 Mass. (9 Gray) 397; s. c. 69 Am. Dec. 295; *Shaw v. Finney*, 54 Mass. (13 Metc.) 453; *Tull v. David*, 45 Mo. 444; *Johnson v. Buck*, 35 N. J. L. (6 Vr.) 338, 342; s. c. 10 Am. Rep. 243; *Smith v. Arnold*, 5 Mason C. C. 414; *Sharman v. Brandt*, L. R. 6 Q. B. 720.

¹ 5 Bing. N. C. 603.

that the purpose of the buyer was probably to fix the seller, not to appoint an agent to sign his own name.

This case was decided by Tindal C. J., Vaughan, Coltman, and Erskine, JJ., in 1839, and was followed by the same Court in 1841, in *Graham v. Fretwell*,² with the concurrence of Maule J., who had succeeded Vaughan J. on the bench.

§ 303. The whole subject was fully discussed in *Durrell v. Evans*, decided in the Exchequer by Pollock C. B., and Bramwell and Wilde BB. in 1861,¹ and reversed by the unanimous opinions of Crompton, Willes, Byles, Blackburn, Keating, and Mellor, JJ., in the Exchequer Chamber in 1862.³

The facts were these: The plaintiff, Durrell, had hops for sale, in the hands of his factor, Noakes, and the [*231] defendant *failed in an attempt to bargain for them with Noakes. Afterwards, the plaintiff and the defendant went together to Noakes's premises, and there concluded a bargain in his presence. Noakes made a memorandum of the bargain in his book, which contained a counterfoil, on which he also made an entry. He then tore out the memorandum and delivered it to the defendant, who kept it and carried it away. Before taking away the memorandum, the defendant requested that the date might be altered from the 19th to the 20th of October (the effect of this alteration, according to the custom of the trade, being to give to the defendant an additional week's credit), and the plaintiff and Noakes assented to this, and the alteration was accordingly made.

The memorandum was in the following words:—

“Messrs. Evans.

“Bought of J. T. & W. Noakes.

“Bags.	Pockets.	T. Durrell.	} 16l. 16s.
	33	Ryarsh & Addington.	

“Oct. 20th, 1860.”

¹ 3 M. & G. 368.

² 31 L. J. Ex. 337; 1 H. & C.

³ 30 L. J. Ex. 254; s. c. *nom. Durrell v. Evans*, 6 H. & N. 660. 174.

The entry on the counterfoil was as follows:—

"Sold to Messrs. Evans.			
"Bags.	Pockets.	T. Durrell.	} 16l. 16s.
	38	Ryarsh & Addington.	
"Oct. 20th, 1860."			

On the trial, before Pollock C. B. the defendant contended that he had never signed or authorized the signature of his name as required by the 17th section to bind the bargain. The plaintiff contended that the name "Messrs. Evans" written on the counterfoil was so written by Noakes as the defendant's agent; that if written by himself, it would have been a sufficient signature according to the authority of *Johnson v. Dodgson* (*ante*, p. 223), and that he was as much bound by the act of his agent in placing the signature there as if done by himself.

The Court of Exchequer were unanimously of opinion that Noakes throughout had acted solely in behalf of the vendor, and that the request of the defendant that the *memorandum should be changed from the 19th to [*232] the 20th, was to obtain an advantage from the vendor, but in no sense to make Noakes the agent of the purchaser. They therefore made absolute a rule for a nonsuit, for which leave had been reserved at the trial.

The Court of Exchequer Chamber, with equal unanimity, distinguished the case from *Graham v. Musson* (*ante*, p. 230), and held, that there was evidence to go to the jury that Noakes was the agent of the defendant, as well as of the plaintiff, in making the entries; and, if so, that the writing of the defendant's name on the counterfoil was a sufficient signature according to the whole current of authority.

The grounds for distinguishing the case from *Graham v. Musson* were stated by the different judges:—

Crompton J.: "I cannot agree with my brother Wilde and Mr. Lush that the document in question was merely an invoice, and that all the defendant did was simply taking an invoice and asking to have it altered: and if the jury had found that, a nonsuit would have been right. But, on the contrary, I think that there was plenty of evidence to go to

the jury on the question whether Noakes the agent was to make a record of a binding contract between the parties, and that there was at least some evidence from which the jury might have found in the affirmative." The learned judge then pointed out that the memorandum was in duplicate, one "sold," the other "bought," made in the defendant's presence; that the latter took it, read it, had it altered, and adopted it, all of which facts he considered as evidence for the jury that Noakes was the agent of both parties.

Byles J.: "What does the defendant do? First of all, he sees a duplicate written by the hand of the agent, and he knows it is a counterpart of that which was binding on the plaintiff. He knew what was delivered out to him was a sale-note in duplicate, and accepts and keeps it. The evidence of what the defendant did, both before and after Noakes had written the memorandum, shows that Noakes was authorized by the defendant."

Blackburn J.: "The case in the Court below pro-
[*233] ceeded *on what was thrown out by my brother Wilde, and I agree with the decision of that Court, if this document were a bill of parcels, or an invoice in the strict sense, viz., a document which the vendor writes out, not on the account of both parties, but as being the account of the vendor, and not a mutual account. But in the present instance, I cannot as a matter of course look at this instrument as an invoice, a bill of parcels; as intended only on the vendor's account. Perhaps, I should draw the inference that it was, but it is impossible to deny that there was plenty of evidence that the instrument was written out as *the* memorandum by which, and by nothing else, both parties were to be bound. There certainly was evidence, I may say a good deal of evidence, that Noakes was to alter this writing, not merely as the seller's account, but as a document binding both sides. . . In *Graham v. Musson*, the name of the defendant, the buyer, did not appear on the document. The signature was that of Dyson, the agent of the seller, put there at the request of Musson, the buyer, in order to bind the seller; and unless the name of Dyson was used as equivalent to Musson, there was no signature by the defend-

ant: but in point of fact, 'J. Dyson' was equivalent to 'for or per pro. North & Co., J. Dyson.'"

§ 304. [In *Murphy v. Boese*,¹ before the Court of Exchequer, in 1875, the plaintiff sought to recover the price of goods sold to the defendant. It appeared that the plaintiff's traveller wrote out the order for the goods in duplicate upon printed headings in the defendant's presence, handed to him the duplicate memorandum and retained the original. Held, that there was no evidence that the traveller had authority to sign the memoranda as the defendant's agent, so as to bind him within the 17th section. The Court, bound of course by the decision of the Exchequer Chamber in *Durrell v. Evans*, distinguished it upon the ground that in that case there was some evidence of the factor's authority to sign on the defendant's behalf; at the same time Bramwell B., who was a * party to the judgment of the Court [*234] of Exchequer in *Durrell v. Evans*, which was afterwards reversed by the Exchequer Chamber, and Pollock B., expressed their doubts as to the correctness of that decision. The latter learned judge said:² "I think *Durrell v. Evans* can only be supported if it decides that the agency did not commence till after the memorandum was written out, and that will distinguish it from the facts before us. It might be said that the direction given by the defendant to Noakes the factor to alter the instrument, was an adoption of his act in preparing it, or a recognition *ab initio* of the whole document as containing the contract. Or one might go further and say that, from the nature of the transaction and the meeting of the parties at the office, it might be thought that there was evidence that it was meant that Noakes should act as the scribe of both parties, in drawing up a note of the contract. But here, there is an entire absence of any act of recognition by the defendant of the traveller as his agent."]

§ 305. It will have been observed, that in some of the cases already referred to, it is taken for granted that an

¹ L. R. 10 Ex. 126.

² At page 131.

auctioneer is an agent for both parties *at a public sale*, for the purpose of signing. This has long been established law.¹ Sir James Mansfield, in *Emmerson v. Heelis*, thus gave the reason for the decisions: "By what authority does he write down the purchaser's name? By the authority of the purchaser. These persons bid, and announce their biddings loudly and particularly enough to be heard by the auctioneer. For what purpose do they do this? That he may write down their names opposite to the lots. Therefore, he writes the name by the authority of the purchaser, and he is an agent for the purchaser."²

¹ *Hinde v. Whitehouse*, 7 East, 558; *Emmerson v. Heelis*, 2 Taunt. 38; *White v. Proctor*, 4 Taunt. 209; *Kenworthy v. Schofield*, 2 B. & C. 945; *Walker v. Constable*, 1 B. & P. 306; *Farebrother v. Simmons*, 5 B. & Ald. 333; *Durrell v. Evans*, 31 L. J. Ex. 337; 1 H. & C. 174.

² *Auctioneer is agent for both parties*, and an entry made by him in his sale book, at the time of sale, containing a description of the property sold, the names of the parties, and the price and terms of sale, is a sufficient memorandum. *Adams v. McMillan*, 7 Port. (Ala.) 73; *Craig v. Godfroy*, 1 Cal. 415; s. c. 54 Am. Dec. 299; *White v. Crew*, 16 Ga. 416; *Linn Boyd Tobacco Warehouse Co. v. Terrell*, 13 Bush (Ky.) 463; *Lake v. Campbell*, 18 Ill. 109; *Doty v. Wilder*, 15 Ill. 407; s. c. 60 Am. Dec. 756; *Burke v. Haley*, 7 Ill. (2 Gilm.) 614; *Hart v. Woods*, 7 Blackf. (Ind.) 568; *Pike v. Balch*, 38 Me. 302; s. c. 61 Am. Dec. 248; *Cleaves v. Foss*, 4 Me. (4 Greenl.) 1; *Singstack v. Harding*, 4 Harr. & J. (Md.) 186; s. c. 7 Am. Dec. 609; *Bent v. Cobb*, 75 Mass. (9 Gray) 397; s. c. 59 Am. Dec. 295; *Morton v. Dean*, 54 Mass. (13 Metc.) 388; *Davis v. Rowell*, 19 Mass. (2 Pick.) 64; s. c. 13 Am. Dec. 396; *Johnson v. Buck*, 35 N. J. L. (6 Vr.) 338, 342; s. c. 10 Am. Rep. 243; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659; *Pugh v. Chesseldine*, 11

Ohio, 109; s. c. 37 Am. Dec. 414; *Anderson v. Chick*, 1 Bail. (S. C.) Eq. 118; *Episcopal Church of Macon v. Wiley*, 2 Hill. (S. C.) Eq. 584; s. c. 1 Riley (S. C.) Eq. 156; 30 Am. Dec. 386; *Meadows v. Meadows*, 3 McC. (S. C.) 457; s. c. 15 Am. Dec. 645; *Gordon v. Sims*, 2 McC. (S. C.) Eq. 164; *Davis v. Robertson*, 1 Mill (S. C.) Const. 71; s. c. 12 Am. Dec. 611; *Jenkins v. Hogg*, 2 Tread. (S. C.) Const. 821; *Dawson v. Miller's Admr.*, 20 Tex. 171; s. c. 70 Am. Dec. 380; *Brock v. Jones*, 8 Tex. 78; *Harvey v. Stevens*, 43 Vt. 655, 656; *Smith v. Jones*, 7 Leigh (Va.) 165; s. c. 30 Am. Dec. 498; *Brent v. Green*, 6 Leigh (Va.) 16. See *post*, § 310, note 1.

Signature of memorandum by clerk of the auctioneer, under the direction of the auctioneer, in the latter's sale-book, at the time of the sale, will be sufficient, if it contains the other requisites of a memorandum. *Doty v. Wilder*, 15 Ill. 407; s. c. 60 Am. Dec. 756; *Norris v. Blair*, 39 Ind. 90; s. c. 10 Am. Rep. 135; *Johnson v. Buck*, 35 N. J. L. (6 Vr.) 338; s. c. 10 Am. Rep. 243; *Baptist Church v. Bigelow*, 16 Wend. (N. Y.) 28; *Frost v. Hill*, 3 Wend. (N. Y.) 386; *Browne on Statute of Frauds*, § 389; *Chitty on Contr.* 354. However, there are other courts which hold that an auctioneer's clerk is not authorized to make the memorandum, required to take the case out of the Statute of Frauds;

(*Meadows v. Meadows*, 3 McC. (S. C.) 458; s. c. 15 Am. Dec. 645; see *post*, 307, note 3;) notwithstanding any usage of trade to the contrary. *Colesby v. Trecothick*, 9 Ves. 251.

Auctioneer's memorandum.—To bind the purchaser, the auctioneer's memorandum must be made at the time of the sale. *Craig v. Godfroy*, 1 Cal. 415; s. c. 54 Am. Dec. 299; *Horton v. McCarty*, 53 Me. 394; *O'Donnell v. Leeman*, 43 Me. 158, 160; *Alna v. Plummer*, 4 Me. (4 Greenl.) 258; *Gill v. Bicknell*, 56 Mass. (2 Cush.) 355; *Smith v. Arnold*, 5 Mason C. C. 414; *Flintoft v. Elmore*, 18 Up. Can. C. P. 274. An auctioneer must act as the agent of both parties, or neither will be bound. See *Smith v. Neefus*, 63 Barb. (N. Y.) 63. It is said while an auctioneer is the seller's agent throughout, he becomes also the buyer's agent from the time the hammer falls. See *Craig v. Godfroy*, 1 Cal. 415; s. c. 54 Am. Dec. 299; *Burke v. Haley*, 7 Ill. (2 Gilm.) 614; *Norris v. Blair*, 39 Ind. 90; s. c. 10 Am. Rep. 135; *Horton v. McCarty*, 53 Me. 394; *Alna v. Plummer*, 4 Me. (4 Greenl.) 258; *Gill v. Bicknell*, 56 Mass. (2 Cush.) 355; *Morton v. Dean*, 54 Mass. (13 Metc.) 385; *Johnson v. Buck*, 35 N. J. L. (6 Vr.) 338; s. c. 10 Am. Rep. 243; *Baltzen v. Nicolay*, 53 N. Y. 467; *Coles v. Bowne*, 10 Paige Ch. (N. Y.) 526; *Hicks v. Whitmore*, 12 Wend. (N. Y.) 548; *Cathcart v. Kiernaghan*, 5 Strobh. (S. C.) L. 120; *Harvey v. Stevens*, 43 Vt. 653; *Bamber v. Savage*, 52 Wis. 110; *Smith v. Arnold*, 5 Mason C. C. 414; *Pierce v. Corf*, L. R. 9 Q. B. 210; s. c. 8 Moak Eng. Rep. 316; *Warlow v. Harrison*, 28 L. J. Q. B. 18; s. c. 1 El. & El. 295; *Bartlett v. Purnell*, 4 Ad. & E. 792; *Bird v. Boulter*, 2 Barn. & Ad. 443; *Hinde v. Whitehouse*, 7 East, 558; *Mews v. Carr*, 1 Hurl. & N. 484; *Clarkson v. Noble*, 2 Up. Can. Q. B. 361; *Henderson v. Barnewall*, 1 Younge & J. 387; *Blackburn on Sales*, 78; *Browne on Statute of Frauds* (4th ed.) Appx.; *Campbell on Sales*, 223, 224; *Lang.*

Cas. on Sales, 1034, 475, 395, 384, 102; *Wood on Frauds*, §§ 422, 424, 427.

The Supreme Court of Maine say in *Horton v. McCarty*, 53 Me. 394, that: "The auctioneer is the agent for both parties to a certain extent. He is the agent of the seller in selling, and the agent of the purchaser to perfect the bargain by signing a proper memorandum at the proper time."

A similar doctrine is held in *Linn Boyd Tobacco Warehouse Co. v. Terrill*, 13 Bush (Ky.) 463; *Gill v. Hewett*, 7 Bush (Ky.) 10; *Morton v. Dean*, 54 Mass. (13 Metc.) 385; *Johnson v. Buck*, 35 N. J. L. (6 Vr.) 338; s. c. 10 Am. Rep. 243; *Price v. Durin*, 56 Barb. (N. Y.) 647; *Townsend v. Van Tassel*, 8 Daly (N. Y.) 261; *Mills v. Hunt*, 20 Wend. (N. Y.) 431; *Harvey v. Stevens*, 43 Vt. 653. In an action by either against the other, the signature of the defendant's name made by the auctioneer at the time of the sale, is a sufficient signing within the statute. *Johnson v. Buck*, 35 N. J. L. (6 Vr.) 338; s. c. 10 Am. Rep. 243. See, also, *Morton v. Dean*, 54 Mass. (13 Metc.) 385; *Davis v. Rowell*, 19 Mass. (2 Pick.) 64; s. c. 13 Am. Dec. 398; *McComb v. Wright*, 4 Johns. Ch. (N. Y.) 659; *The First Baptist Church v. Bigelow*, 16 Wend. (N. Y.) 28; *Mews v. Carr*, 1 Hurl. & N. 484; *White v. Proctor*, 4 Taunt. 209; *Emmerson v. Heelis*, 2 Taunt. 38; *Kemeys v. Proctor*, 3 Ves. & B. 57.

Requisites of auctioneer's memorandum.—The auctioneer's memorandum must contain the terms of the contract, and show on its face or in connection with some other writing, the whole of such contract, so that there need not be any resort to parol evidence, to ascertain the terms of the sale or intention of the parties. *Ellis v. Deadman's Heirs*, 4 Bibb (Ky.) 466; *Parker's Heirs v. Bodley*, 4 Bibb (Ky.) 102; *McConnell v. Brillhart*, 17 Ill. 354; s. c. 65 Am. Dec. 661; *Doty v. Wilder*, 15 Ill. 407; s. c. 60

[It would seem that a contract signed by an auctioneer on behalf of an undisclosed proprietor is a valid contract under the statute.³]

[*235] * It follows from this reasoning that the rule does not apply in a case where the auctioneer sells the goods of his principal at private sale, for then he is the agent of the vendor alone, and in no sense that of the purchaser. And such was accordingly the decision of the Exchequer Court in *Mews v. Carr*.⁴

§ 306. And on the same principle it has been held, that the circumstances of the case may be used to rebut the general inference that the auctioneer is agent to sign the name of the highest bidder as purchaser, according to the conditions of the sale. Thus, in *Bartlett v. Purnell*,¹ the defendant bought goods at public auction, under an agreement with the plaintiff, who was the executor of the defendant's deceased husband, that the defendant should be at liberty to buy, and that the price should go towards payment of a legacy of 200*l.*, to which the defendant was entitled under the will of the deceased. The conditions of the sale were, that the purchasers were to pay a certain percentage at the sale, and the rest on delivery. The auctioneer put the defendant's name, like that of all other purchasers, on his catalogue as the highest bidder, and it was contended that he was her agent for that purpose, and that she was therefore bound by the written conditions of the sale. But the Court held, that the real purchase was not a purchase at auction: that the sale was made before the auction, and that the public bidding was only used for the purpose of settling the price at which the purchaser was to take the goods under the antecedent bargain; and that the auctioneer

Am. Dec. 756; *Norris v. Blair*, 39 *Ind.* 90; *s. c.* 10 *Am. Rep.* 135; *Morton v. Dean*, 54 *Mass.* (13 *Metc.*) 285; *Johnson v. Buck*, 35 *N. J. L.* (6 *Vr.*) 338; *s. c.* 10 *Am. Dec.* 243; *Soles v. Hickman*, 20 *Pa. St.* 180; *s. c.* 72 *Am. Dec.* 635; *Farson's Appeal*, 11 *Pa. St.* 503; *Potter v. Duffield*, *L. R.* 18 *Ex. Cas.* 4; *Fitzmaurice v. Bay-*

ley, 9 *H. L. Cas.* 78; *Nicholson v. Fields*, 7 *Hurl. & N.* 810.

³ See *per Malins V.-C.* in *Beer v. London and Paris Hotel Company*, 20 *Eq.* 412, 426, and *per Jessel, M. R.* in *Rossiter v. Miller*, 46 *L. J. Ch.* 228, 231.

⁴ 26 *L. J. Ex.* 39; 1 *H. & C.* 484.

¹ 4 *A. & E.* 792.

was not the agent of the purchaser. Denman C. J. saying "We do not overrule the former cases, but we consider them inapplicable."

§ 307. But the agency of the auctioneer for the purchaser only begins where the contract is completed by knocking down the hammer. Up to that moment he is the agent of the * vendor exclusively. It is only when [*236] the bidder has become the purchaser, that the agency arises; and until then the bidder may retract, and the auctioneer may do the same in behalf of the vendor.¹

In *Bird v. Boulter*,² the person who signed the purchaser's name was not the auctioneer, but his clerk. Held to be sufficient. [But in that case there were special circumstances from which the clerk's authority to sign was inferred; under ordinary circumstances the auctioneer's clerk is not the purchaser's agent.³]

¹ *Warlow v. Harrison*, 28 L. J. Q. B. 18; 1 E. & E. 295.

As to auctioneer's authority to sign for the seller, vide ante, § 305, note 2.

² 4 B. & Ad. 443.

American authorities. — *Norris v. Blair*, 39 Ind. 90; s. c. 10 Am. Rep. 135; *Alna v. Plummer*, 4 Me. (4 Greenl.) 258; *Gill v. Bicknell*, 56 Mass. (2 Cush.) 355; *Fiske v. McGregory*, 34 N. H. 414, 418, 419; *Johnson v. Buck*, 35 N. J. L. (6 Vr.) 338, 342, 343; s. c. 10 Am. Rep. 243; *Meadows v. Meadows*, 3 McC. (S. C.) 458; s. c. 15 Am. Dec. 645; *Cathcart v. Keirnaghan*, 5 Strobh. (S. C.) 129; *Smith v. Jones*, 7 Leigh (Va.) 165; s. c. 30 Am. Dec. 498; *Coate v. Terry*, 24 Up. Can. C. P. 571.

³ *Pierce v. Corf*, L. R. 9 Q. B. 210, per Blackburn J. at p. 215. See, also, *M'Mullen v. Helberg*, 4 L. R. Ir. 94, per O'Brien J. at p. 105.

Signature of memorandum by auctioneer's clerk is a sufficient note in writing to bind the vendee. *Carmack v. Masterson*, 3 Stew. & P. (Ala.) 411; *Norris v. Blair*, 39 Ind. 90; s. c. 10 Am. Rep. 135; *Hart v. Woods*, 7 Blackf. (Ind.) 568; *Alna v. Plummer*,

4 Me. (4 Greenl.) 258; *Ijams v. Hoffman*, 1 Md. 423, 425; *Gill v. Bicknell*, 56 Mass. (2 Cush.) 355; *Morton v. Dean*, 54 Mass. (13 Metc.) 385; *Johnson v. Buck*, 35 N. J. L. (6 Vr.) 338; s. c. 10 Am. Rep. 243; *Coles v. Bowne*, 10 Paige Ch. (N. Y.) 520; *Frost v. Hill*, 3 Wend. (N. Y.) 386; *Entz v. Mills*, 1 McMull. (S. C.) 453; *Cathcart v. Keirnaghan*, 5 Strobh. (S. C.) 129; *Harvey v. Stevens*, 43 Vt. 653; *Bird v. Bolter*, 4 Barn. & Ad. 443; s. c. Lang. Cas. on Sales, 395; *Hinde v. Whitehouse*, 7 East, 558; s. c. Lang. Cas. on Sales, 102; *Henderson v. Barnewall*, 1 Young & J. 387; s. c. Lang. Cas. on Sales, 384; *Crooks v. Davis*, 6 Grant (Ont.) 317; *Pierce v. Corf*, L. R. 9 Q. B. 210; s. c. 8 Moak's Eng. Rep. 316. See *ante*, § 305, note 2. It has been held that an entry by the clerk of an auctioneer was not by an authorized agent so as to bind the purchaser. *Meadows v. Meadows*, 3 McCord (S. C.) 458; s. c. 15 Am. Dec. 645. See, also, *Norris v. Blair*, 39 Ind. 90; *Alna v. Plummer*, 4 Me. (4 Greenl.) 258; *Gill v. Bicknell*, 56 Mass. (2 Cush.) 355; *Smith v. Jones*, 7 Leigh (Va.) 165; s. c. 30 Am. Dec.

§ 308. The signature of a clerk or of a telegraph company to a despatch was held to be sufficient where the original instructions had been signed by the party, in *Godwin v. Francis*, L. R. 5 C. P. 295.

§ 309. The signature required by the statute is that of the party to be charged, or his agent. If, therefore, the signature be not that of the agent, *quâ* agent, but only in the capacity of witness to the writing, it will not suffice.¹

In *Gosbell v. Archer*,² the clerk of the auctioneer, who had authority to act for his master, signed a memorandum of the sale, as witness to the signature of the buyer, and an attempt was made to set up the clerk's signature as that of a duly authorized agent of the vendor. The attempt was unsuccessful, and a dictum of Lord Eldon³ to the contrary was said by Denman C. J. to be open to much observation. The dictum of Lord Eldon was, that "where a party or principal or person to be bound signs as, *what he cannot be*, a witness, he cannot be understood to sign otherwise than as principal."

[As to the personal liability of the auctioneer for the delivery of goods sold by him, see *Woolfe v. Horne*, 2 Q. B. D. 355.⁴]

§ 310. There is a class of persons who make it their business to act as agents for others in the purchase and sale of

498; *Bamber v. Savage*, 52 Wis. 110; s. c. 38 Am. Rep. 723; *Coate v. Terry*, 24 Up. Can. C. P. 571; *Flint v. Elmore*, 18 Up. Can. C. P. 274; *Clarkson v. Noble*, 2 Up. Can. Q. B. 361. See *ante*, § 305, note 2. The court intimates the same doctrine in *Pierce v. Corf*, L. R. 9 Q. B. 210; s. c. 8 Moak's Eng. Rep. 316. See *ante*, § 305, note 2.

¹ A memorandum made by an agent of both parties has been held sufficient to take the contract out of the Statute of Frauds, although the agent made the memorandum for his own benefit. *Noakes v. Morey*, 30 Ind. 103.

² 2 A. & E. 500.

³ In *Coles v. Trecothick*, 9 Ves.

251; and see the observations of Lord St. Leonards, Sugd. V. & P. p. 143, ed. 1862.

⁴ *Personal liability of auctioneer.*—An auctioneer acting as agent of another in the sale of property is personally responsible as vendor, unless at the time of the sale he discloses the name of his principal. *Mills v. Hunt*, 20 Wend. (N. Y.) 431. And if the auctioneer alone was trusted, and he expressly agreed for himself to warrant the title, then the promise is not collateral and will be binding, although not in writing. *Schell v. Stephens*, 50 Mo. 375. See, also, *Sherwood v. Stone*, 14 N. Y. 267; *Wolff v. Koppel*, 5 Hill (N. Y.) 458; *Browne on Frauds*, sec. 213.

goods, known to the common law as brokers. These persons, as a * general rule, are agents for both parties,¹ and their signature to the memorandum or note of the agreement is binding on both principals, if the memorandum be otherwise sufficient under the statute.²

The authority of a broker to bind his principals may by special agreement be carried to any extent that the principal may choose, but the customary authority of brokers is for the most part so well settled, as to be no longer a question of fact dependent upon evidence of usage, but a constituent part of that branch of the common law known as the law-merchant, or the custom of merchants. There are still, however, some points on which the limits of their authority are not fully determined, and on which evidence of usage would have a controlling influence in deciding on the rights of the parties.³

¹ *Thompson v. Gardiner*, L. R. 1 C. P. D. 777.

Broker may sign for both parties. — Brokers are agents for both parties, and duly empowered by virtue of their employment to make a memorandum which shall bind both parties. *Hinckley v. Arey*, 27 Me. 362; *Coddington v. Goddard*, 82 Mass. (16 Gray) 442; *Clason v. Bailey*, 14 Johns. (N. Y.) 484; *Merritt v. Clason*, 12 Johns. (N. Y.) 102; s. c. 7 Am. Dec. 286; *Fowler v. Hollins*, L. R. 7 Q. B. 616; s. c. 3 Moak's Eng. Rep. 232; 14 Moak's Eng. Rep. 138; affirmed in L. R. 7 H. L. 757; *Heyman v. Neale*, 2 Camp. 337; *Langdell Cas. on Sales*, 348, 541, 614. See *ante*, § 305, note 2.

As to brokers contracting without principal, see *Fleet v. Murton*, 7 Q. B. 127; s. c. 1 Moak's Eng. Rep. 32; *Sharman v. Brandt*, L. R. 6 Q. B. 720; *Mollett v. Robinson*, L. R. 7 C. P. 84; s. c. 1 Moak's Eng. Rep. 335; *Humfrey v. Dale*, 7 El. & B. 266. See *ante*, § 305, note 2. However, the decisions are not uniform on this question, and there are cases which restrict the broker's authority to sign

for one party. *Coddington v. Goddard*, 82 Mass. (16 Gray) 436; *Davis v. Shields*, 26 Wend. (N. Y.) 341; *McMullen v. Helburg*, L. R. 4 Ir. 94; *Moore v. Campbell*, 10 Ex. 323; *Langdell Cas. on Sales*, 465, 558, 614.

Brokers' memorandum book-entries are held by the courts as a compliance with the Statute of Frauds, no matter how concise they may be, provided they may not materially vary from the oral contract. *Hinckley v. Arey*, 27 Me. 363; *Boardman v. Spooner*, 95 Mass. (13 Allen) 353; *Coddington v. Goddard*, 82 Mass. (16 Gray) 436; *Clason v. Bailey*, 14 Johns. (N. Y.) 484; *Langdell Cas. on Sales*, 514, 610, 614, 1035. See *infra*, § 334, note 5.

² See *Coddington v. Goddard*, 82 Mass. (16 Gray) 442; *Shaw v. Finney*, 54 Mass. (13 Metc.) 463, 456; *Hinckley v. Arey*, 27 Me. 362; *Lawrence v. Gallagher*, 42 N. Y. Supr. Ct. (10 Jones & S.) 309; *Story Agency*, §§ 28, 31. See *Butler v. Thomson*, 92 U. S. (2 Otto) 412; bk. 23, L. ed. 684; *Newberry v. Wall*, 84 N. Y. 576.

³ See, for example, *Dickinson v. Lilwall*, 4 Campb. 279; *Baines v.*

§ 311. Before entering into an examination of the authorities, it will be convenient to give a short summary of the statutes in relation to brokers in the City of London, as many of the cases turn upon their dealings.

Until the year 1870, the brokers of London had from very early times been under the control of the corporation of the city. The statutes of 6 Anne, c. 16, 10 Anne, c. 19, s. 121, and 57 Geo. III. c. 60,¹ contain provisions for the regulation of brokers, and for defining the power of the corporation. Under these acts the city formerly required a bond and an oath, the form of which, prior to the year 1818, may be found given in *Kemble v. Atkins*, 7 Taunt. 260; s. c. Holt, N. P. 431. The regulations imposed, and the form of the bond as altered in 1818, are printed at length in the appendix to "Russell on Factors and Brokers." It is imposed as a duty on the broker, that he shall "keep a book or register, intituled 'The Broker's Book,' and therein truly and fairly enter all such contracts, bargains, and agreements, on the

day of the making thereof, together with the christian and *surname at full length of both the buyer and seller, and the quantity and quality of the articles sold or bought, and the price of the same, and the terms of credit agreed upon, and deliver a contract-note to both buyer and seller, or either of them, upon being requested so to do, within twenty-four hours after such request, respectively containing therein a true copy of such entry; and shall upon demand made by any or either of the parties, buyer or seller, concerned therein, produce and show such entry to them or either of them, to manifest and prove the truth and certainty of such contracts and agreements."

But by the London Brokers Relief Act, 1870,² most of these powers were taken away, the bonds are no longer required, the rules and regulations are no longer to be enforced by the corporation, and now brokers are only required to be

Ewing, L. R. 1 Ex. 320; s. c. 35 L. J. Ex. 194.

¹ These statutes will be found at p. 450 of vol. i. of Chitty's Collection of Statutes, ed. 1880.

² 33 & 34 Vict. c. 60. The reasons for passing this act are given in the note at p. 452 of Chitty's Statutes, vol. i., ed. 1880.

admitted by the corporation, and a List of Brokers is kept, from which any broker may be removed for fraud or other offences in the manner specified in the act.

§ 312. Lord Blackburn¹ warns his readers not to confound the contract notes here mentioned, which are a copy of the entry, with the bought and sold notes which are or ought to be made out at the time of making the contract, and generally as soon as, or before it is entered in the book, and he remarks that no mention is made of the bought and sold notes in the bonds or regulations. But Lord Ellenborough expressly says, in *Hinde v. Whitehouse*,² and *Heyman v. Neale*,³ that the bought and sold notes are "transcribed from the book," are "copies of the entry," and this may be found repeated *passim* in the reported cases, although no doubt these notes are very frequently made in the manner stated by Lord Blackburn, as is also apparent in the reported cases.

The brokers in London are bound by the customs of trade just as all other brokers are, and such customs are valid in spite of anything to the contrary in the bonds and regulations which are purely municipal.⁴

§ 313. * When a broker has succeeded in making a [*239] contract, he reduces it to writing, and delivers to each party a copy of the terms as reduced to writing by him. He also ought to enter them in his book, and sign the entry. What he delivers to the seller is called the sold note: to the buyer the bought note. No particular form is required, and from the cases it seems that there are four varieties used in practice.

The *first* is where on the face of the notes the broker professes to act for both the parties whose names are disclosed in the note. The sold note then, in substance, says, "sold for A. B. to C. D.," and sets out the terms of the bargain: the bought note begins, "Bought for C. D. of A. B.," or equivalent language, and sets out the same terms as the sold note, and both are signed by the broker.

¹ Blackburn on Sale, p. 98.

² 7 East, 559.

³ 2 Camp. 337.

⁴ *Ex parte Dyster*, 2 Rose, 348.

The *second* form is where the broker does not disclose in the bought note the name of the vendor, nor in the sold note the name of the purchaser, but still shows that he is acting as broker, not principal. The form then is simply, "Bought for C. D.," and "Sold for A. B."

The *third* form is where the broker, on the face of the note, appears to be the principal, though he is really only an agent. Instead of giving to the buyer a note, "Bought for you by me," he gives it in this form, "Sold to you by me." By so doing he assumes the obligation of a principal, and cannot escape responsibility by parol proof, that he was only acting as broker for another, although the party to whom he gives such a note is at liberty to show that there was an un-named principal, and to make this principal responsible (*ante*, pp. 199-202).

The *fourth* form is where the broker professes to sign as a broker, but is really a principal, as in the cases of *Sharman v. Brandt*, and *Mollett v. Robinson*, *ante*, pp. 201-2, in which case his signature does not bind the other party, and he cannot sue on the contract.

§ 314. According to either of the first two forms, the party who receives and keeps a note, in which the broker tells him in effect, "I have bought for you," or "I have sold for you," plainly admits that the broker acted by his authority, [*240] and as * his agent, and the signature of the broker is therefore the signature of the party accepting and retaining such a note;¹ but according to the third form, the broker says, in effect, "I myself sell to you" and the acceptance of a paper describing the broker as the principal who sells, plainly repels any inference that he is acting as agent for the party who buys, and in the absence of other evidence, the broker's signature would not be that of an agent of the party retaining the note: and by the fourth form, the language of the written contract is at variance with the real truth of the matter.

These observations (many of which are extracted from "Blackburn on Sale") have a direct bearing on points long

¹ *Thompson v. Gardiner*, L. R. 1 C. P. D. 777.

in dispute, and some of which are yet vexed questions, as will abundantly appear on a review of the authorities.

§ 315. Where the bought and sold notes and the entry in the broker's books all correspond, no dispute can arise as to the real terms of the bargain; but it sometimes happens that the bought and sold notes differ from each other, and even that neither corresponds with the entry in the book. It then becomes necessary to determine the legal effect of the variance, and there has not only been great conflict in the decisions of the courts, but sometimes great change in the opinions of the same judge. As regards the signed entry in the broker's book, it has been held at different times that it did, and that it did not, constitute the contract between the parties;¹ and it has also been held that it was not even admissible in evidence, or, at all events, not without proof, that the entry was either seen by the parties when they contracted, or was assented to by them. The most convenient method of reviewing the decisions will be to follow the leading cases in order of time, and then deduce the propositions fairly embraced in them.

§ 316. In 1806 there was this dictum of Lord Ellenborough in *Hinde v. Whitehouse*¹ on the subject: "In all sales made by brokers acting between the parties buying and selling, * *the memorandum in the broker's* [*241] *book and the bought and sold notes transcribed therefrom,* and delivered to the buyers and sellers respectively, have been holden a sufficient compliance with the statute." His Lordship here speaks of bought and sold notes as mere copies of the book, and the inference would be that he considered the book, as the original, to be of more weight than copies from it.

§ 317. In 1807, he gave this opinion expressly in *Heyman v. Neale*¹ saying: "After the broker has entered the contract in his book, I am of opinion that neither party can recede from it. *The bought and sold note is not sent on approbation,*

¹ See *Remick v. Sanford*, 118 Mass. 106, 107; *Coddington v. Goddard*, 82 Mass. (16 Gray) 442.

¹ 7 East, 509.

¹ 2 Camp. 337.

nor does it constitute the contract. The entry made and signed by the broker who is the agent of both parties *is alone the binding contract.* What is called the bought and sold note *is only a copy of the other*, which would be valid and binding, although no bought or sold note was ever sent to the vendor and purchaser." In this case the bought and sold notes were sworn by the broker to be copies of the entry in his book, and the buyer had, soon after receiving the bought note, objected and said he would not be bound by it.

§ 318. In 1810, in *Hodgson v. Davies*,¹ the sale was through a broker, who rendered bought and sold notes, showing that payment was to be by bills at two and four months. Five days afterwards the defendant, being called on for delivery of the goods sold, objected to the sufficiency of the plaintiff, and refused to perform the contract. Lord Ellenborough thought at first that the contract concluded by the broker was absolute, *unless his authority was limited by writing of which the purchaser had notice.* But the gentlemen of the special jury said that unless the name of the purchaser has been previously communicated to the seller, if the payment is to be by bill, the seller is always understood to reserve to himself the power of disapproving of the sufficiency of the purchaser, and annulling the contract. Lord Ellenborough allowed this to be a valid and reasonable usage,

but left it to the jury whether the delay of five [*242] days in objecting was *not unreasonable according to the usual commercial practice, and the jury found that it was.

§ 319. In 1814, the Court of Common Pleas decided the case of *Thornton v. Kempster*¹ (*ante*, p. 216), where the broker's sold note described a sale of St. Petersburg hemp, and the bought note described the goods as Riga Rhine hemp, a different and superior article. The Court considered the case as though no broker had intervened, and the parties had personally exchanged the notes, holding that there never had been any agreement as to the subject-matter of the contract, and therefore no contract at all between the parties.

¹ 2 Camp. 530.

¹ 5 Taunt. 786.

In 1816, *Cumming v. Roebuck*² was tried before Gibbs C. J. at Nisi Prius, and it appeared that the bought and sold notes differed. The learned Chief Justice said: "If the broker deliver a different note of the contract to each party contracting, there is no valid contract. There is, I believe, a case which states the entry in the broker's book to be the original contract, but it has been since contradicted."

It has been surmised that the case alluded to was that of *Heyman v. Neale*,³ but no case has been found in the Reports justifying the assertion of the Chief Justice that *Heyman v. Neale* had been contradicted.

§ 320. In 1826, the subject first came before the full Court in the Queen's Bench in two cases.

In the first, *Grant v. Fletcher*,¹ there was a material variance between the bought and sold notes, and the broker had made an unsigned entry in his "memorandum-book," which entry was incomplete, not naming the vendor. The plaintiff was non-suited at the assizes on the ground that there was no valid contract between the parties. Abbott C. J. delivered the opinion of the Court on the motion for a new trial. "The broker is the agent of both parties, and, as such, may bind them by signing the *same contract* on behalf of buyer and seller; but if he does not sign the

* *same contract* for both parties, neither will be bound. [*243]

. . . The entry in the broker's book is, *properly speaking, the original, and ought to be signed by him*. The bought and sold notes delivered to the parties *ought to be copies of it*. A valid contract may probably be made by perfect notes signed by the broker, and delivered to the parties, although the book be not signed; but if the notes are imperfect, an unsigned entry in the book will not supply the defect."

§ 321. In *Groom v. Aflalo*,¹ the other case, the decision was express that the bought and sold notes suffice to satisfy the statute, if otherwise unobjectionable, even though the

² Holt, 172.

³ 2 Camp. 337.

¹ 5 B. & C. 436.

¹ 6 B. & C. 117.

entry in the broker's book be unsigned. The broker in this case made his entry complete in its terms on the 23d of February as soon as he had concluded the contract, but did not sign it. On the same evening he sent to the parties bought and sold notes signed by him, copied from the entry in his books. Next morning the defendant objected to, and returned the sold note, and refused to deliver the goods. The Court held the contract binding, notwithstanding the absence of signature to the entry in the book, Abbott C. J. saying, "The entry in the book has been called the original, and the notes copies: but there is not *any actual decision that a valid contract may not be made, by notes duly signed, if the entry be unsigned.* . . . We have no doubt that a broker ought to sign his book, and that every punctual broker will do so. But *if we were to hold such a signature essential to the validity of a contract, we should go further than the Courts have hitherto gone,* and might possibly lay down a rule that would be followed by serious inconvenience, *because we should make the validity of the contract to depend upon some private act, of which neither of the parties to the contract would be informed,* and thereby place it in the power of a negligent or fraudulent man to render the engagements of parties valid or invalid at his pleasure."

§ 322. In *Thornton v. Meux*,¹ in 1827, tried before Chief Justice Abbott, at Guildhall, there was a variance [*244] between the *bought and sold notes, and plaintiff offered in evidence the entry in the broker's book to show which of the two was correct, but on objection, the evidence was excluded, the Chief Justice saying: "I used to think at one time that the broker's book was the proper evidence of the contract; but I afterwards changed my opinion, and held, conformably to the rest of the Court, that the copies delivered to the parties were the evidence of the contract they enter into, still feeling it to be a duty in the broker to take care that the copies should correspond. I think I must still act upon that opinion, and refuse the evidence."

¹ Moo. & M. 43.

§ 323. It will be apparent from the foregoing cases how completely the opinion of the learned Chief Justice had been changed; his view being, *first*, in *Grant v. Fletcher*, that the book was the original, though *probably*, if the bought and sold notes were perfect, the book might be dispensed with; *secondly*, in *Groom v. Aflalo*, that the broker's signature in his book was *not essential* to the validity of the contract; and *thirdly*, in *Thornton v. Meux*, that the signed entry was not even admissible in evidence, and that the bought and sold notes were the *sole* evidence of the contract between the parties.

§ 324. *Hawes v. Forster*¹ was twice tried; first in 1832, and again in 1834. On the first trial, the plaintiff put in the bought note, and proved by the broker that he had made the contract, entered it in his book, signed the entry, and sent the bought and sold notes to the parties on the same evening; but the broker could not tell which was first written, the entry or the notes. Plaintiff closed his evidence without calling for the sold note, and thereupon the defendant moved for non-suit, but Lord Denman held that the plaintiff was not bound to give any evidence of the sold note. The defendant then offered to prove by the broker's book a variance from the bought note put in, contending that the entry was the original contract; but this was objected to on the authority of *Thornton v. Meux* (*supra*, p. 243), and the * evidence was rejected, Lord Denman saying: "I am of opinion that the plaintiffs have proved a contract by producing the bought note. . . . It is not shown that the sold note delivered to the defendants differed from the bought note delivered to the plaintiffs; had that been the case, it would have been very material. But in the absence of all proof of that nature, I am clearly of opinion that I must look to the bought note, *and to that alone*, as the evidence of the terms of the contract."

The defendants afterwards moved for a non-suit before the Court in Banc, on the ground of the non-production of the sold note, but failed. They also moved for a new trial, on

¹ 1 Moo. & Rob. 368.

the ground of the exclusion of the broker's book, and succeeded, the Lord Chief Justice saying, "that the Court doubted whether the case involved any point of law at all, and whether it did not rather turn upon the custom, viz., how the broker's book was treated by those who dealt with him." On the second trial, the sold note was produced, and corresponded with the bought note, and proof was given by merchants that the broker's book was never referred to, and that they always looked to the bought and sold notes as the contract. The broker's book showed a material variance from the bought and sold notes, and Lord Denman put the question to the jury, "Whether the bought and sold notes constituted the contract, or whether the entry in the broker's book, which in this instance differed from the bought and sold notes, constituted it?" His Lordship intimated his own opinion to be that in law the note delivered by the broker was the real contract;² but said that it had been thought better to take the opinion of the jury as to the usage of trade as a matter of fact, and told them: "If the evidence has satisfied you that, according to the usage of trade, the bought and sold notes are the contract, then you will find a verdict for the plaintiffs." The jury found for the plaintiffs, and the defendants at first indicated the intention of carrying the case to a higher Court, but afterwards submitted to the verdict.

[*246] § 325. * In 1842, the Exchequer Court had the subject, together with the decision in *Hawes v. Forster*, under consideration, in the case of *Thornton v. Charles*.¹ Parke B. and Lord Abinger held opposite opinions. Parke B. said: "I apprehend it has never been decided that the note entered by the broker in his book, and signed by him, would not be good evidence of the contract so as to satisfy the Statute of Frauds, there being no other. The case of *Hawes v. Forster* underwent much discussion in the Court of King's Bench when I was a member of that Court, and there was some difference of opinion among the judges; but ultimately

² See *dictum* of Denman C. J. also, in *Trueman v. Loder*, 11 A. & E. 589.

¹ 9 M. & W. 802.

it went down to a new trial, in order to ascertain whether there was any usage or custom of trade which makes the broker's note evidence of the contract. . . . *Certainly it was the impression of part of the Court that the contract entered in the book was the original contract, and that the bought and sold notes did not constitute the contract.* The jury found that the bought and sold notes were evidence of the contract; but, on the ground that these documents having been delivered to each of the parties after signing the entry in the book, constituted evidence of a *new* contract, made between the parties on the footing of those notes.² That case may be perfectly correct, but it does not decide that if the bought and sold notes disagree, or (and?) there be a memorandum in the book made according to the intention of the parties, that memorandum signed by the broker would not be good evidence to satisfy the Statute of Frauds." Lord Abinger said: "I desire it to be understood that I adhere to the opinion given by me, that when the bought and sold notes differ materially from each other, there is no contract, unless it be shown that the broker's book was known to the parties."

§ 326. In *Pitts v. Beckett*,¹ in 1845, the plaintiff, who had wool for sale in the hands of a wool-broker, took the defendant to the broker's office, and there sold the wool by sample in the broker's presence, it being part of the bargain that the wool * was to be *in good dry condition*. In [*247] the afternoon of the same day the broker wrote to the plaintiff: "Dear Sir, — We have this day sold on your account, Messrs. Beckett & Brothers" (here followed a description of the terms) "brokerage, 1 per cent. Hughes and Ronald." A machine copy of this communication was made in the broker's book. The broker did not write at all to the purchasers, nor send them any note of the contract. The note to the plaintiff said nothing about the stipulation that the bulk should be in good dry condition. The defendants rejected the wool when sent to them, on the ground that it

² See statement of Patteson J. to same effect, *infra*, p. 250.

¹ 13 M. & W. 743.

was not in good condition, and the jury found this to be true. The evidence offered was the note written to the plaintiff, and the machine copy of it as being the entry in the broker's book. Held, that the authority given to the broker by the defendant was, not to make a bargain for him, but to reduce to writing and sign the bargain actually made; that the broker, therefore, was without authority from the defendant to sign a bargain which omitted one of the material stipulations, viz., that the wool should be in good dry condition; and that the paper offered in evidence against defendants was therefore not signed by them or their agent. The judges also intimated very strongly the opinion, that the broker's signature was not intended by him to represent the buyer's signature, and that the paper was a mere letter of advice, written in his character of agent of the plaintiff, copied by machine into his letter-book, and not intended as one of the bought and sold notes usually delivered by brokers.

§ 327. In 1851, the subject was elaborately considered in the Queen's Bench, in the case of *Sievwright v. Archibald*,¹ before Lord Campbell C. J. and Erle, Patteson, and Wightman, JJ. The case was tried at Guildhall before the Chief Justice, and there was a verdict for the plaintiff, with leave reserved to move to set it aside, and enter a verdict for the defendant. The declaration set out an alleged "sold note," and contained a count for goods bargained and sold. A variance was afterwards discovered between the bought [*248] and sold notes, and an amendment *alleging the bought note was allowed, on its being stated to the learned Chief Justice that the plaintiff could give evidence of a subsequent ratification of the bought note by the defendant. The sold note was for a sale to the defendant of "500 tons *Messrs. Dunlop, Wilson & Co.'s* pig iron." The bought note was for "500 tons of *Scotch* pig iron." The broker proved an order from the plaintiff to sell 500 tons of Dunlop, Wilson & Co.'s iron: that their iron was Scotch

¹ 20 L. J. Q. B. 529; 17 Q. B. 115. See *Jeffcott v. No. Br. Oil Co.*, 8 Ir. C. L. 17; see, also, *ante*, § 310, note 1.

iron, and that they were manufacturers of iron in Scotland; and that the agreement with the defendant was, that he purchased from the broker 500 tons of *Dunlop, Wilson & Co.'s* iron. The name of the sellers was given to the purchaser. The bought and sold notes were complete in every respect, and corresponded, save in the variance between the words "Scotch iron" and "Dunlop, Wilson & Co.'s iron." *There was no entry in the broker's books signed by him.*

§ 328. The views of the judges differed so widely, and their observations on every branch of this vexed subject are so important, that it is necessary to transcribe them at considerable length. Lord Campbell's judgment was concurred in entirely by Wightman J., who heard the argument in April, but was unable to be present at the decision in the following June.

His lordship first held, that there was not sufficient evidence to justify the verdict of the jury that the defendant had ratified the contract expressed in the bought note. Next, that there was no parol agreement shown by the evidence, antecedent to the bought note, and of which that bought note could properly be said to be a memorandum, but that *the agreement itself was intended to be in writing, and was understood by the parties to have been reduced to writing when made*: and his lordship then continued his reasoning on the supposition that this view was erroneous, and that there had been an antecedent parol agreement, in these words: "Can this (the bought note) be said to be a true memorandum of the agreement? We are here again met by the question of the *variance*, which is as strong

*between the parol agreement and the bought note, [*249] as between the bought note and the sold note. If the bought note can be considered a memorandum of the parol agreement, so may the sold note, and which of them is to prevail? It seems to me, therefore, that we get back to the same point at which we were when the variance was first objected to, and the declaration was amended. I by no means say that where there are bought and sold notes, they must necessarily be the only evidence of the contract:

circumstances may be imagined in which they might be used as a memorandum of a parol agreement. Where there has been an entry of the contract by the broker in his book, signed by him, I should hold without hesitation, notwithstanding some dicta and a supposed ruling by Lord Tenterden, in *Thornton v. Meux*, to the contrary, *that this entry is the binding contract between the parties*, and that a mistake made by him when sending a copy of it in the shape of a bought or sold note would not affect its validity. Being authorized by the one to sell and the other to buy in the terms of the contract, when he has reduced it into writing, and signed it as their common agent, it binds them both according to the Statute of Frauds, as if both had signed it with their own hands. The duty of the broker requires him to do so, and until recent times, this duty was scrupulously performed by every broker. What are called the bought and sold notes are sent by him to his principals by way of information that he has acted upon their instructions, *but not as the actual contract which was to be binding on them*. This clearly appears from the practice still followed, of sending the bought note to the buyer and the sold note to the seller, whereas, if these notes had been meant to constitute the contract, the bought note would be put into the hands of the seller, and the sold note into the hands of the buyer, that each might have the engagement of the other party, and not his own. But the broker, to save himself trouble, now omits to enter and sign any contract in his book, and still sends the bought and sold notes as [*250] before. If these agree, they are held to constitute *a binding contract; *if there be any material variance between them, they are both nullities, and there is no binding contract*. This last proposition, though combated by the plaintiff's counsel, has been laid down and acted upon in such a long series of cases, that I could not venture to contravene it if I did not assent to it. . . . In the present case, there being a material variance between the bought and sold notes, they do not constitute a binding contract; there is no entry in the broker's book signed by him; and if there were a parol agreement, there being no sufficient

mention of it in writing, nor any part acceptance or part payment, the Statute of Frauds has not been complied with, and I agree with my brother Patteson in thinking that the defendant is entitled to our verdict."

§ 329. Patteson J. said that the sole question was whether there was a note or memorandum in writing of the bargain signed by the defendant or his agent, it being quite immaterial whether there was one signed by the plaintiff; that the memorandum need not be the contract itself, but that a contract might be by parol, and if a memorandum were afterwards made, embodying the contract, and signed by one party or his agent, he being the party to be charged, the statute was satisfied. Still, if the original contract was in writing, signed by both parties, *that* would be the binding instrument, and no subsequent memorandum signed by *one* party could have any effect. The learned judge considered that in the case before the Court the contract was not in writing; that it was made by the broker, acting for both parties, but was not signed by him or them, and that the statute therefore could not be satisfied unless there was some *subsequent* memorandum, signed by the defendant or his agent. His Lordship then continued: "There are subsequent memoranda signed by the broker, namely, the bought and sold notes. Which of these, if either, is the memorandum in writing signed by the defendant or his agent? The bought note is delivered to the buyer, the defendant: the sold note to the seller, the plaintiff. Each of them in the language used purports to be a representation by the broker to the *person to whom it is de- [*251] livered of what he, the broker, has done as agent for that person. Surely the bought note delivered to the buyer cannot be said to be the memorandum of the contract, signed by the buyer's agent, in order that he might be bound thereby, for then it would have been delivered to the seller, not to the buyer, and *vice versa* as to the sold note. Can, then, the sold note delivered to the seller be treated as the memorandum signed by the agent of the buyer, and binding him, the buyer, thereby? The very language shows that it can-

not. In the City of London, where this contract was made, the broker is bound to enter in his books and sign all contracts made by him; and if the broker had made such signed entry, *I cannot doubt, notwithstanding the cases and dicta apparently to the contrary, that such memorandum would be the binding contract on both parties.*" The learned judge then went on to say that he had been one of the judges of the Court that granted the new trial in *Hawes v. Forster*, and he confirmed the account given of that case by Parke B., in *Thornton v. Charles* (*supra*, p. 246). He then continued: "However, in the present case there was no signed memorandum in the broker's book. Therefore, the bought and sold notes together, or one of them, must be the memorandum in writing signed by the defendant's agent, or there is none at all, and the statute will not be satisfied. If the bought and sold notes together be the memorandum, and they differ materially, it is plain that there is no memorandum. The Court cannot possibly say, nor can a jury say, which of them is to prevail over the other. Read together, they are inconsistent; assuming the variance between them to be material, and if one prevails over the other, that one will be the memorandum, and not the two together. If, on the other hand, one only of these notes is to be considered as the memorandum in writing signed by the defendant's agent, and binding the defendant, which of them is to be so considered, the bought note delivered to the defendant himself, or the sold note delivered to the plaintiff? I have already stated that I cannot think either of them by [*252] itself can be so treated. . . . If this were **res integra*, I am strongly disposed to say that I should hold the bought and sold notes together not to be a memorandum to satisfy the Statute of Frauds, but I consider the point to be too well settled to admit of discussion. Yet there is no case in which they have varied, in which the Court has upheld the contract, plainly showing that the two together have been considered to be the memorandum binding both parties, the reason of which is, I confess, to my mind, quite unsatisfactory, but I yield to authority."

§ 330. Erle J. stated the question raised in the case as follows: "The defendant contends, *first*, that in cases where a contract is made by a broker, and bought and sold notes have been delivered, they alone constitute the contract, that all other evidence of the contract is excluded, and that if they vary a contract is disproved." The learned judge held, that the defendant had failed to establish this proposition, and then observed: "The question of the effect either of an entry in a broker's book signed by him, or of the acceptance of bought and sold notes, which agree, is not touched by the present case. I assume that sufficient parol evidence of a contract in the terms of the bought note delivered to the defendant has been tendered, and *that the point is whether such evidence is inadmissible, because a sold note was delivered to the plaintiff; in other words, whether bought and sold notes, without other evidence of intention, are by presumption of law a contract in writing. I think they are not.* If bought and sold notes, which agree, are delivered and accepted without objection, such acceptance, without objection, is evidence for the jury of mutual assent to the terms of the notes, but the assent is to be inferred by the jury, from their acceptance of the notes without objection, not from the signature to the writing, which would be the proof, if they constituted a contract in writing. . . . The form of the instrument is strong to show that they are not intended to constitute a contract in writing, but to give information from the agent to the principal of that which has been done in his behalf. . . . No person acquainted with legal consequences would intend to make a written contract depend on separate *instruments, sent at separate times, in various forms, neither party having seen both instruments. Such a process is contrary to the nature of contracting, of which the essence is interchange of consent at a certain time. . . . It seems to me, therefore, that upon principle, *the mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree.*" The learned judge then pointed out the distinction between proof of a contract, and proof of a compliance with the statute,

saying: "The question of a compliance with the statute does not arise till the contract is in proof. In case of a written contract, the statute has no application. In case of other contracts, the compliance may be proved by part payment or part delivery, or memorandum in writing of the bargain. Where a memorandum in writing is to be proved as a compliance with the statute, it differs from a contract in writing; in that it may be made at any time after the contract, if before the action commenced, and any number of memoranda may be made, all being equally originals; and it is sufficient if signed by one of the parties only, or his agent, and if the terms of the bargain can be collected from it, although it be not expressed in the usual form of an agreement."

His lordship then held, that upon a review of the evidence in the case, there was sufficient parol proof to show that the bought note was a correct statement of the terms of the bargain, and that defendant had acquiesced in and was satisfied with it.

§ 331. The next case was *Parton v. Crofts*,¹ in 1864, where the contract note delivered to the purchaser was alone produced in evidence, and it was held that it sufficed to prove the contract between the two parties, and that the presumption was that the bought and sold notes did not vary; if they did, it was for the defendant to prove the variance by giving in evidence the note sent to the seller.

In *Heyworth v. Knight*,² the same Court decided in [*254] the * same year that where the contract appears in a correspondence to have been completed between the brokers, and the bought and sold notes show a variance from that contract, the parties are bound by the agreement contained in the correspondence; that the bought and sold notes are to be disregarded; and that the purchaser was bound by the agreement made in the correspondence in accordance with the authority given to his broker, although the broker had signed without authority a different contract in

¹ 16 C. B. N. S. 11; 33 L. J. C. P. 189.

² 17 C. B. N. S. 298; 33 L. J. C. P. 298.

the bought and sold notes. In this case the decision of the Privy Council in *Cowie v. Remfry*, 5 Moore P. C. C. 232, was very strongly disapproved by Willes J.

§ 332. The next case, in 1868, was *Cropper v. Cook*.¹ It decides that it is not a variance between the bought and sold notes that the bought note shows the names of the two principals, and the sold notes states, "Sold to our principals, &c.," without naming the buyers. It was proven in the case that a special usage exists in the wool trade, in Liverpool, that the buyer's broker may contract in the name of the principal, or at his discretion, without disclosing the principal's name, thus making himself personally responsible, if requested to do so by the vendor; and that the broker may do this, without communicating the fact to the buyer. The Court held this usage reasonable and valid.

§ 333. [The last case was *Thompson v. Gardiner*,¹ in 1876. A broker who acted only for the plaintiff, the seller, entered into a contract for the sale of butter to the defendant, sending a contract note to each party, but only *signing* the note sent to the plaintiff. *He, however, duly entered and signed both notes in his broker's book.* The defendant kept the bought note, but when called upon to accept the butter declined to do so on the ground that the bought note was unsigned. The Court held — first (Grove J., dubitante), that the defendant by his conduct in retaining the note had acknowledged the broker's authority *to sign the contract* on his behalf; and, secondly, that even if the defendant were not bound by the broker's signature to the sold note, the signature in the * broker's book was sufficient to [*255] satisfy the statute. "The broker being a broker authorized *to make a memorandum of the contract on the defendant's behalf*, the entry in his book was sufficient evidence of a memorandum of the bargain signed by a duly-authorized agent within the meaning of the Statute of Frauds to bind the defendant." Per Cur. at p. 780.]

§ 334. The following propositions are submitted as fairly deducible from the authorities just reviewed, and others

¹ L. R. 3 C. P. 194.

¹ 1 C. P. D. 777.

quoted in the notes, though some of these points cannot be considered as finally settled.

First. — The broker's signed entry in his book constitutes the contract between the parties, and is binding on both.¹ This proposition rests on the authority of Lord Ellenborough in *Heyman v. Neale*,² of Parke B., in *Thornton v. Charles*,³ and of Lord Campbell C. J., and Wightman and Patteson JJ., in *Sievwright v. Archibald*,⁴ [and of the Court in *Thompson v. Gardiner*.⁵]

Gibbs C. J., in *Cumming v. Roebuck*; ⁶ Abbott C. J., in *Thornton v. Meux*; ⁷ Denman C. J., in *Townend v. Drakeford*; ⁸ and Lord Abinger, in *Thornton v. Charles*,³ are authorities to the contrary, but they seem to have been overruled in *Sievwright v. Archibald*.⁴

§ 335. *Secondly.* — The bought and sold notes do not *constitute* the contract. This is the opinion of Parke B., in *Thornton v. Charles*; ¹ of Lord Ellenborough, in *Heyman v. Neale*,²

¹ *Broker's authority.* — Where the broker exceeds his authority, the principal is not bound. *Coddington v. Goddard*, 82 Mass. (16 Gray) 436; *Davis v. Shields*, 26 Wend. (N. Y.) 341; *Peltier v. Collins*, 3 Wend. (N. Y.) 467; s. c. 20 Am. Dec. 711; *McMullan v. Helburgh*, L. R. 4 I. R. 94; *Megaw v. Molloy*, L. R. 2 Ir. 530. See, also, *Remick v. Sandford*, 118 Mass. 102, 106; *Dodd v. Farlow*, 93 Mass. (11 Allen) 426.

² 2 Campb. 337.

³ 9 M. & W. 802.

⁴ 20 L. J. Q. B. 529; 17 Q. B. 115.

⁵ 1 C. P. D. 777.

Broker's memorandum book. — The memorandum required by the Statute of Frauds may be made by the broker in his book. *Williams v. Woods*, 16 Md. 220, 250; *Coddington v. Goddard*, 82 Mass. (16 Gray) 436, 442; *Sale v. Darragh*, 2 Hilt. (N. Y.) 184, 197; *Clason v. Bailey*, 14 Johns. (N. Y.) 484; *Sievwright v. Archibald*, 17 Q. B. 102, 109; *Goom v. Afalo*, 6 Barn. & Cress. 117. But the writing to be designed to evidence the con-

tract of the parties must clearly show what they agreed to; it must show a valid and binding contract entered into, which can be enforced; and in that respect it cannot be aided, assisted, or helped out by parol proof. *Sale v. Darragh*, 2 Hilt. (N. Y.) 184, 198; *Bailey v. Ogdens*, 3 Johns. (N. Y.) 418; s. c. 3 Am. Dec. 509; *Peltier v. Collins*, 3 Wend. (N. Y.) 465; s. c. 20 Am. Dec. 711; *Weightman v. Caldwell*, 17 U. S. (4 Wheat.) 85; bk. 4, L. ed. 520; *Elmore v. Kingscote*, 5 Barn. & Cress. 583; *Kenworthy v. Schofield*, 2 Barn. & Cress. 948; *Ormond v. Anderson*, 2 Ball & B. 368; *Acebal v. Levy*, 10 Bing. 376; *Boydell v. Drummond*, 11 East, 142; *Hinde v. Whitehouse*, 7 East, 558; *Seagood v. Meale*, Prec. in Ch. 560; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Rose v. Cunynghame*, 11 Ves. 550. See § 310, note 1.

⁶ Holt, 172.

⁷ M. & M. 43.

⁸ 1 Car. & K. 20.

¹ 9 M. & W. 802.

² 2 Camp. 337.

and was the unanimous opinion of the four judges in *Sievevright v. Archibald*.³ The decision to the contrary, in the *Nisi Prius* case of *Thornton v. Meux*,⁴ and the *dicta* in *Groom v. Aflalo*,⁵ and *Trueman v. Loder*,⁶ are pointedly disapproved in the case of *Sievevright v. Archibald*.³

§ 336. *Thirdly*.—But the bought and sold notes, when they correspond and state all the terms of the bargain, are complete * and sufficient evidence to satisfy the [*256] statute; even though there be no entry in the broker's book, or, what is equivalent, only an unsigned entry. This was first settled by *Groom v. Aflalo*,¹ and reluctantly admitted to be no longer questionable in *Sievevright v. Archibald*.²

§ 337. *Fourthly*.—Either the bought or sold note alone will satisfy the statute, provided no variance be shown between it and the other note, or between it and the signed entry in the book. This was the decision in *Hawes v. Forster*,¹ of the Common Pleas in *Parton v. Crofts*,² [and of the Common Pleas Division in *Thompson v. Gardiner*.³]

§ 338. *Fifthly*.—Where one note only is offered in evidence, the defendant has the right to offer the other note or the signed entry in the book to prove a variance. *Hawes v. Forster*¹ is direct authority in relation to the entry in the book, and in all the cases on variance, particularly in *Parton v. Crofts*, *supra*, it is taken for granted that the defendant may produce his own bought or sold note to show that it does not correspond with the plaintiff's.

§ 339. *Sixthly*.—As to *variance*. This may occur between the bought and sold notes where there is a signed

* 20 L. J. Q. B. 529; 17 Q. B. 115.

⁴ M. & M. 43.

⁶ B. & C. 117.

⁶ 11 A. & E. 509.

¹ B. & C. 117.

² 20 L. J. Q. B. 529; 17 Q. B. 115. See, also, *Cleu v. McPherson*, 1 Bosw. (N. Y.) 480.

¹ 1 Mood. & Rob. 368.

² 16 C. B. N. S. 11; 33 L. J. C. P. 189.

* 1 C. P. D. 777. See *Remick v. Sandford*, 118 Mass. 102; *Dodd v. Farlow*, 93 Mass. (11 Allen) 426; *Cabot v. Winsor*, 83 Mass. (1 Allen) 546; *Coddington v. Goddard*, 82 Mass. (16 Gray) 436; *Newberry v. Wall*, 84 N. Y. 576; *Dike v. Reitlinger*, 23 Hun (N. Y.) 241; *Butler v. Thompson*, 92 U. S. (2 Otto) 412; bk. 23, L. ed. 684.

¹ 1 Mood. & Rob. 368.

entry, or where there is none. It may also occur when the bought and sold notes correspond, but the signed entry differs from them. If there be a signed entry, it follows from the authorities under the *first* of these propositions, that this entry will in general control the case, because it constitutes the contract, of which the bought and sold notes are merely secondary evidence, and any variance between them could not affect the validity of the original written bargain. If, however, the bought and sold notes correspond, but there be a variance between them taken collectively and the entry in the book, it becomes a question of fact for the jury whether the acceptance by the parties of the bought and sold notes constitutes evidence of a *new* contract [*257] modifying that which * was entered in the book.

This is the point established by *Hawes v. Forster*¹ according to the explanation of that case first given by Parke B., in *Thornton v. Charles*,² afterwards by Patteson J., in *Sievewright v. Archibald*,³ and adopted by the other judges in this last-named case.⁴

§ 340. *Seventhly*.—If the bargain is made by correspondence, and there is a variance between the agreement thus concluded, and the bought and sold notes, the principles are the same as those just stated which govern variance between a signed entry, and the bought and sold notes, as decided in *Heyworth v. Knight*.¹

§ 341. *Eighthly*.—If the bought and sold notes vary, and there is no signed entry in the broker's book nor other writing showing the terms of the bargain, there is no valid contract.¹ This is settled by *Thornton v. Kempster*,² *Cumming*

¹ Mood. & R. 368.

² 9 M. & W. 802.

³ 17 Q. B. 115; 20 L. J. Q. B. 529.

⁴ *Coddington v. Goddard*, 82 Mass. (16 Gray) 436, 442; *Peltier v. Collins*, 3 Wend. (N. Y.) 459; s. c. 20 Am. Dec. 711.

¹ 17 C. B. N. S. 298; 33 L. J. C. P. 298.

Where a contract is partly printed

and partly in writing and there is a conflict between the printing and writing, the written matter must prevail over the printed. *Hill v. Miller*, 76 N. Y. 32.

¹ *Bought and sold notes*.—Where the same broker acts for both parties, the bought and sold notes delivered by him must correspond with each other, or there will be no binding contract, *Suydam v. Clark*, 2 Sandf.

v. Roebuck,³ *Thornton v. Meux*,⁴ *Grant v. Fletcher*,⁵ *Gregson v. Rucks*,⁶ and *Siewewright v. Archibald*.⁸ The only opinion to the contrary is that of Erle J., in the last-named case. In one case, however, at Nisi Prius, *Rowe v. Osborne*,⁷ Lord Ellenborough held the defendant bound by *his own signature* to a bought note delivered to the vendor which did not correspond with the note signed by the broker and sent to the defendant.

§ 342. *Lastly*.—If a sale be made by a broker on credit, and the name of the purchaser has not been previously communicated to the vendor, evidence of usage is admissible to show that the vendor is not finally bound to the bargain until he has had a reasonable time, after receiving the sold note, to inquire into the sufficiency of the purchaser, and to withdraw if he disapproves. This was decided in *Hodgson v. Davies*,¹ and as the special jury spontaneously intervened in that case, and the usage was held good without

(N. Y.) 133. See *Grant v. Fletcher*, 5 Barn. & Cress. 436; *Moore v. Campbell*, 10 Ex. 323, 330; *Cumming v. Roebuck*, Holt, N. P. C. 172; *Cowie v. Remfry*, 10 Jur. 789; *Siewewright v. Archibald*, 17 Q. B. 103; *Gregson v. Ruck*, 4 Q. B. 747; *Butters v. Glass*, 31 Up. Can. Q. B. 379; 1 Chitty Contr. (11th Am. ed.) 551. See, also, *Coddington v. Goddard*, 82 Mass. (16 Gray) 436; s. c. Lang. Cas. on Sales, 614; *Newbery v. Wall*, 65 N. Y. 484; s. c. 84 N. Y. 576; *Suydam v. Clark*, 2 Sandf. (N. Y.) 183; s. c. Lang. Cas. on Sales, 581; *Davis v. Shields*, 26 Wend. (N. Y.) 341; s. c. Langd. Cas. on Sales, 558; *Peltier v. Collins*, 3 Wend. (N. Y.) 459; s. c. 20 Am. Dec. 711; *Butler v. Thompson*, 11 Blatchf. C. C. 533; s. c. 92 U. S. (2 Otto) 412; bk. 23, L. ed. 684; *Newell v. Radford*, L. R. 3 C. P. 52; *Thompson v. Gardiner*, L. R. 1 C. P. Div. 777; s. c. 18 Moak Eng. Rep. 328; *Maclean v. Dunn*, 4 Bing. 722; s. c. Lang. Cas. on Sales, 390; *Hodgson v. Davis*, 2 Campb. 531; *Heyman v. Neale*, 2 Campb. 337; s. c. Lang.

Cas. on Sales, 348; *Heyworth v. Knight*, 17 C. B. N. S. 298; *Parton v. Crofts*, 16 C. B. N. S. 11; s. c. Lang. Cas. on Sales, 508; *Kempson v. Boyle*, 3 Hurl. & C. 763; *Thornton v. Charles*, 9 Mees. & W. 802; s. c. Lang. Cas. on Sales, 436; *Bold v. Rayner*, 1 Mees. & W. 342; *Hawes v. Forster*, 1 Moo. & R. 368; s. c. Lang. Cas. on Sales, 410; *Thornton v. Kempster*, 5 Taunt. 786; s. c. Lang. Cas. on Sales, 364; *Siewewright v. Archibald*, 17 Q. B. 115; s. c. Lang. Cas. on Sales, 452; *Gregson v. Ruck*, 4 Q. B. 747; *Blackburn on Sales*, 88, 89; *Campbell on Sales*, 427, 438; *Story on Sales*, § 269; *Wood on Frauds*, §§ 430, 434, 436. However, a contrary doctrine seems to be maintained in *Adams v. Gray*, 8 Conn. 11; s. c. 20 Am. Dec. 82.

³ 5 Taunt. 786.

⁴ Holt, 172.

⁴ 1 M. & M. 43.

⁵ 5 B. & C. 436.

⁶ 4 Q. B. 747.

⁷ 1 Stark. 140.

¹ 2 Camp. 531.

[*258] proof of *it, it is not improbable that the custom might now be considered as judicially recognized by that decision, and as requiring no proof,² but it would certainly be more prudent to offer evidence of the usage.

§ 343. A singular point was decided in *Moore v. Campbell*.¹ A broker employed by the plaintiff to purchase hemp made a contract with the defendant, and sent him a sold note. The defendant replied in writing, "I have this day sold through you to Mr. Moore, &c., &c." The terms stated in this letter varied from those in the sold note sent to the defendant. The Court held that these were not bought and sold notes by a broker of both parties, and that the broker was acting for the plaintiff alone. The plaintiff's counsel contended that the defendant's letter was sufficient proof of the contract to bind him, and must be taken to be his own correction of the sold note made by the broker, and binding on him. But the Court held that although this was true if the intention of the parties was that this letter should constitute the contract, yet if the defendant never intended to be bound as seller unless the plaintiff was also bound as buyer, and meant that the plaintiff should also sign a note to bind himself, there would be no valid contract. The case was therefore remanded for the trial of this question of fact by the jury.²

§ 344. A mere difference in the *language* of the bought and sold notes will not constitute a variance, if the *meaning* be the same, and evidence of mercantile usage is admissible to explain the language and to show that the meanings of

¹ See *Brandao v. Barnett*, 3 C. B. 519, on appeal to H. of L.; s. c. 12 Cl. & Fin. 787, as to the necessity for proving mercantile usages. Also, 1 Sm. L. C. 602, ed. 1879.

² 23 L. J. Ex. 310; 10 Ex. 323.

² Where a broker simply brings the parties together, after which the parties negotiate with each other directly, the broker cannot make an entry of such sale in his books, so as to bind either party or as will prevent either party from giving parol evi-

dence of the contract. *Aguirre v. Allen*, 10 Barb. (N. Y.) 74; affirmed, 7 N. Y. 543. As to the power of a broker to bind the parties by a memorandum in his books, see *Lawrence v. Gallagher*, 42 N. Y. Sup. Ct. (10 J. & S.) 309, 319; *Haydock v. Stowe*, 40 N. Y. 368; *Bush v. Cole*, 28 N. Y. 269; *Dykers v. Townsend*, 24 N. Y. 59; *Pringle v. Spaulding*, 53 Barb. (N. Y.) 21; *Davis v. Shields*, 26 Wend. (N. Y.) 341; *Pitts v. Beckett*, 13 Mees. & W. 751.

the two instruments correspond. The cases in illustration are collected in the note.¹

And where the contract made by the broker was one for the exchange or barter of goods, and he wrote out the *contract in the shape of bought and sold notes, [*259] giving to each party on a single sheet a bought note for the goods he was to receive, and a sold note for the goods he was to deliver, it was held no variance that the day of payment was specified at the end of both notes on one sheet, and at the end of the bought note only on the other.²

§ 345. The authority of the broker may, of course, like that of any other agent, be revoked by either party before he has signed in behalf of the party so revoking;¹ but after the signature of the duly-authorized broker is once affixed to the bargain, the only case in which the party can be allowed to recede appears to be that mentioned *supra*, p. 257, where a credit sale has been made to an unnamed purchaser, in which event custom allows the vendor to retract if, on inquiry within reasonable time after being informed of the name, he disapproves the sufficiency of the purchaser.²

¹ *Bold v. Rayner*, 1 M. & W. 342; and *per Erle J.* in *Siewwright v. Archibald*, 20 L. J. Q. B. 529; 17 Q. B. 115; *Rogers v. Hadley*, 2 H. & C. 227; 32 L. J. Ex. 227; *Kempson v. Boyle*, 3 H. & C. 763; 34 L. J. Ex. 191.

² *Maclean v. Dunn*, 4 Bing. 722-4.

¹ *Farmer v. Robinson*, 2 Camp. 389 n.; *Warwick v. Slade*, 3 Camp. 127.

² *Revocation of authority of broker.* — Where a broker's agency is not coupled with an interest it is revocable at pleasure. *Blackstone v. Buttermore*, 53 Pa. St. 286; *Clark v. Courtney*, 30 U. S. (5 Pet.) 319; bk. 8, L. ed. 140; *Galt v. Galloway*, 29 U. S. (4 Pet.) 332; bk. 7, L. ed. 876; *Hunt v. Rousmanier*, 21 U. S. (8 Wheat.) 474, 201; bk. 5, L. ed. 589.

The revocation may be by operation of law or by the death either of the principal or the agent. See *Ferrie v. Irving*, 28 Cal. 645; *Harper v.*

Little, 2 Me. (2 Greenl.) 14; s. c. 11 Am. Dec. 25; *Gale v. Tappen*, 12 N. H. 145; s. c. 37 Am. Dec. 194; *Watt v. Watt*, 2 Barb. Ch. (N. Y.) 371; *Aertson v. Cage*, 2 Humph. (Tenn.) 350; *Galt v. Galloway*, 29 U. S. (4 Pet.) 332; bk. 7, L. ed. 876; *Blades v. Free*, 9 Barn. & C. 167; *Wallace v. Cook*, 5 Esp. 117; *Campanari v. Woodburn*, 28 Eng. L. & E. 321; *Smout v. Ilbery*, 10 Mees. & W. 1; *Wynne v. Thomas*, Willes, 563; *Shipman v. Thompson*, Willes, 104, 105; *Littleton*, § 66; Co. Litt. 52; *Story on Agency*, secs. 264, 477, 488.

Where the agency is coupled with an interest, or where it is given for a valuable consideration, in the absence of an express stipulation that it shall be revocable, it cannot be revoked by the principal (*Bonney v. Smith*, 17 Ill. 533; *Franklin v. Osgood*, 14 John. (N. Y.) 527; *Jackson v. Burtis*, 14 John. (N. Y.) 391; *Jackson v. Fer-*

§ 346. And where a broker had, reluctantly and after urgent persuasion by the vendor, made an addition to the sold note, after both the bought and sold notes had been delivered to the parties and taken away, the vendor's contention that this addition was simply inoperative was overruled, and the Court held that the fraudulent alteration of the note destroyed its effect, so that the vendor could not recover on it.¹ And the effect would be the same in the case of a material alteration even not fraudulent.²

§ 347. In *Henderson v. Barnewall*,¹ where the parties contracted in person in presence of the broker's clerk, who had brought them together on the Exchange, and one, in the hearing of the other, dictated to him the terms of the agreement, it was held by all the Barons of the Exchequer that the agency of the clerk was *personal*, and that neither an entry of the bargain in the broker's books nor a sale note signed by him would satisfy the statute, because the clerk could not delegate the agency to his employer.²

ris, 15 John. 346; *Raymond v. Squire*, 11 John. (N. Y.) 47; *Knapp v. Alvord*, 10 Paige Ch. (N. Y.) 205; s. c. 40 Am. Dec. 241; *Marfield v. Douglass*, 1 Sand. (N. Y.) 360; *Bergen v. Bennett*, 1 Caines Cas. (N. Y.) 1; s. c. 2 Am. Dec. 281; *Smyth v. Craig*, 3 Watts & S. (Pa.) 14; *Morgan v. Raynor* (N. Y.), 5 Alb. L. J. 109; *Gaussen v. Morton*, 10 B. & Cress. 731; *Watson v. King*, 4 Camp. 272; *Walsh v. Whitcomb*, 2 Esp. 565; *Smart v. Sandars*, 5 C. B. 895; *Metcalfe v. Clough*, 2 Mann. & R. 178; *Lepard v. Vernon*, 2 Ves. & B. 51; *Bromley v. Holland*, 7 Ves. 28; 2 Kent's Com. 643; 2 Liverm. on Agency, 308; 1 Pars. on Cont. 69, 70, 71, 72; *Smith on Merc. Law* (2d ed.) 71, 72); and the death of the principal will not terminate the agency; *Merrey v. Lynch*, 68 Me. 94; *Hunt v. Rousmanier*, 21 U. S. (8 Wheat.) 174; bk. 5, L. ed. 589.

¹ *Powell v. Devit*, 15 East, 29.

² *Mollett v. Wackerbath*, 5 C. B. 181; 17 L. J. C. P. 47.

Alteration of contract by broker. — Where an agent or broker has implied power simply to sell, he has no power to rescind the sale or materially modify its terms, after it has become an executed contract. *Adrian v. Lane*, 13 S. C. 183; see, also, *Ghirardelli v. McDermott*, 22 Cal. 539.

An alteration by a stranger of a contract, though material, will not render it inoperative. *Nichols v. Johnson*, 10 Conn. 192; *Rees v. Overbaugh*, 6 Cow. (N. Y.) 746; *Jackson v. Malin*, 15 Johns. (N. Y.) 293.

An alteration of a written instrument by mistake will not invalidate it. *Nichols v. Johnson*, 10 Conn. 192; *Wilkinson v. Johnson*, 3 Barn. & Cres. 428; s. c. 10 Eng. C. L. 140; *Raper v. Birkbeck*, 15 East, 17.

¹ 1 Y. & J. 387.

² A signature by a broker's clerk where made in the broker's presence is valid and binding the same as the signature by an auctioneer's clerk. See *ante*, sec. 805, note 2; *Williams v. Woods*, 16 Md. 220.

*BOOK II.

[*260]

EFFECT OF THE CONTRACT IN PASSING PROPERTY.

CHAPTER I.

DISTINCTION BETWEEN CONTRACTS EXECUTED AND EXECUTORY.

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§ 348. AFTER a contract of sale has been formed, the first question which suggests itself is naturally, What is its effect? When does the bargain amount to an actual sale, and when is it a mere executory agreement?

We have already seen¹ that the distinction between the two contracts consists in this, that in a bargain and sale, the thing which is the subject of the contract becomes the property of the buyer, the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in possession of the vendor,² whereas in the executory agreement, the goods remain the property of the vendor till the contract is executed.³ In the

¹ *Ante*, pp. *3 and *78.

² *The sale of a specific chattel passes the property to the vendee without delivery.* See *Crill v. Doyle*, 53 Cal. 713; *Webber v. Davis*, 44 Me. 147; s. c. 69 Am. Dec. 87; *Bailey v. Smith*, 43 N. H. 143; *Dexter v. Norton*, 55 Barb. (N. Y.) 272; *Tome v. Dubois*, 73 U. S. (6 Wall.) 548; bk.

18, L. ed. 843; *Meyerstein v. Barber*, L. R. 2 C. P. 38, 51; s. c. L. R. 4 H. L. 317, 326; *Dixon v. Yates*, 5 B. & Ad. 313.

³ *Leigh v. Mobile & O. R. R. Co.*, 58 Ala. 165; *Cardinell v. Bennett*, 52 Cal. 476; *Olney v. Howe*, 89 Ill. 556; s. c. 31 Am. Rep. 105; *Lester v. East*, 49 Ind. 588, 592; *Straus v. Ross*, 25

one case, A. sells to B.: in the other, he only promises to sell. In the one case, as B. becomes the owner of the goods

Ind. 300; *The Elgee Cotton Cases*, 89 U. S. (22 Wall.) 180; bk. 22, L. ed. 863.

Executed and executory contracts. — Whether a sale is to be considered executed or simply executory is to be determined from the real intention of the parties, as manifested by their language and surrounding circumstances. *Callaghan v. Myers*, 89 Ill. 570; *Weed v. Boston & Salem Ice Co.*, 94 Mass. (12 Allen) 377; *Stone v. Peacock*, 35 Me. 388; *Lingham v. Eggleston*, 27 Mich. 324; *Hurd v. Cook*, 75 N. Y. 454; *Terry v. Wheeler*, 25 N. Y. 525; *Peoples' Bank v. Gayley*, 92 Pa. St. 527; *Nicholson v. Taylor*, 31 Pa. St. 130; s. c. 72 Am. Dec. 728; *Winslow v. Leonard*, 24 Pa. St. 14; s. c. 62 Am. Dec. 354; *Fletcher v. Ingram*, 46 Wis. 201; *Sewell v. Eaton*, 6 Wis. 490; s. c. 70 Am. Dec. 471; *Hatch v. Standard Oil Co.*, 100 U. S. (10 Otto) 124; bk. 25, L. ed. 554; *Elgee Cotton Cases*, 89 U. S. (22 Wall.) 180; bk. 22, L. ed. 863.

The intention of the parties is usually a matter of fact to be found by the jury from the evidence. *Dyer v. Libby*, 61 Me. 45; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 296; *Riddle v. Varnum*, 37 Mass. (20 Pick.) 280; *Wilkinson v. Holiday*, 33 Mich. 386; *Kelsea v. Haines*, 41 N. H. 253; *Fuller v. Bean*, 34 N. H. 290. See *ante*, § 351, note 2. Where the actual intention of the parties cannot be determined as a fact from the evidence, the law will presume the sale to be an actual present sale, except in those cases where the article is not ready for delivery. *Chapman v. Shepard*, 39 Conn. 413; *Bethel Steam Mill Co. v. Brown*, 57 Me. 18; *Riddle v. Varnum*, 37 Mass. (20 Pick.) 283. See, also, *Winslow v. Leonard*, 24 Pa. St. 14; s. c. 62 Am. Dec. 354; *Riddle v. Varnum*, 37 Mass. (20 Pick.) 283; *Sumner v. Hamlet*, 29 Mass. (12 Pick.)

76; *Clark v. Baker*, 46 Mass. (5 Metc.) 452; *Macomber v. Parker*, 30 Mass. (13 Pick.) 175; *Shindler v. Houston*, 1 Den. (N. Y.) 48; s. c. 49 Am. Dec. 316; *Sands v. Taylor*, 5 Johns. (N. Y.) 395; s. c. 4 Am. Dec. 374; *Nicholson v. Taylor*, 31 Pa. St. 123; s. c. 72 Am. Dec. 728; *Scott v. Wells*, 6 Watts & S. (Pa.) 357; s. c. 40 Am. Dec. 668; *Smyth v. Craig*, 3 Watts & S. (Pa.) 14; *Pleasants v. Pendleton*, 6 Rand (Va.) 473; s. c. 18 Am. Dec. 726; *Hawes v. Watson*, 2 Barn. & Cress. 540; *Valpy v. Gibson*, 4 C. B. 864; *Chaplin v. Rogers*, 1 East, 192.

A bargain by words in past or present tense is not conclusive evidence of a perfect sale; for if the vendor did not then own the article contracted for, or it was not then in existence, or not yet manufactured, or not selected out of a lot of similar articles, then the subject-matter of the contract remains undefined and unspecified, and it is incompatible with the very nature of things to call it a perfect sale. *Bailey v. Ogden*, 3 John. (N. Y.) 399; s. c. 3 Am. Dec. 85; *Andrews v. Dieterich*, 14 Wend. (N. Y.) 31; *Prichett v. Jones*, 4 Rawle (Pa.) 260; *Eagle v. Eichelberger*, 6 Watts (Pa.) 29; s. c. 31 Am. Dec. 449; *Jenkins v. Eichelberger*, 4 Watts (Pa.) 121; s. c. 38 Am. Dec. 691; *Mucklow v. Mangles*, 1 Taunt. 318.

Sale of articles in bulk. — A man may sell any kind of articles in bulk, so as to pass the title. *Clark v. Baker*, 46 Mass. (5 Metc.) 452; *Sands v. Taylor*, 5 Johns. (N. Y.) 395; s. c. 4 Am. Dec. 374; *Hawes v. Watson*, 2 Barn. & Cress. 540. He may pass the title to an absent or present thing without delivery. *Shaw v. Levy*, 17 Serg. & R. (Pa.) 99; *Hazard v. Hamlin*, 5 Watts (Pa.) 201. This is the rule except in cases

themselves, as soon as the contract is completed by mutual assent,⁴ if they are lost or destroyed, he is the *sufferer.⁵ In the other case, as he does not become [*261] the owner of the goods, he cannot claim them specifically; he is not the sufferer if they are lost, cannot maintain trover for them, and has at common law no other remedy for breach of the contract, than an action for damages.⁶

where other forms have been prescribed by statute. *Hatch v. Standard Oil Co.*, 100 U. S. (10 Otto) 124; bk. 25, L. ed. 554; but it is said in the *Egglee Cotton Cases*, 89 U. S. (22 Wall.) 180; bk. 22, L. ed. 863, that a sale of cotton will not pass the ownership at once to the buyer where there is no ascertainment of the whole price by weight nor complete preparation for delivery nor any delivery nor payment.

⁴ *When sale of personal property is complete.*—A sale of personal property is complete as soon as both parties have agreed to its terms. *Shaddon v. Knott*, 2 Swan. (Tenn.) 358; s. c. 58 Am. Dec. 63. See *Crawford v. Smith*, 7 Dana (Ky.) 59; *Willis v. Willis*, 6 Dana (Ky.) 48; *Wing v. Clark*, 24 Me. 366; *Potter v. Coward*, Meigs (Tenn.) 22; 1 Chitt. on Contr. 274, 275.

⁵ *At common law* nothing was required to give validity to the sale of personal property, except the mutual assent of the parties to the contract. If the property, by the terms of agreement, passed immediately to the buyer, the contract was deemed a bargain and sale; but if the property in the thing sold was to remain for a time in the seller, and only to pass to the buyer at a future time or on certain conditions inconsistent with its immediate transfer, the contract was deemed an executory agreement. *Hatch v. Standard Oil Co.*, 100 U. S. (10 Otto) 124, 130; bk. 25, L. ed. 554.

⁶ *Where anything remains to be done to the property*, under a contract of sale, the title does not pass, and it is

at the risk of the vendor. *Hudson v. Weir*, 29 Ala. 294; *Stone v. Peacock*, 35 Me. 385; *Keiler v. Tutt*, 31 Mo. 301; *Cunningham v. Ashbrook*, 20 Mo. 553; *Kein v. Tupper*, 52 N. Y. 550; *Evans v. Harris*, 19 Barb. (N. Y.) 416; *Fitch v. Beach*, 16 Wend. (N. Y.) 221; *Ward v. Shaw*, 7 Wend. (N. Y.) 404; *Devane v. Fennell*, 2 Ired. (N. C.) L. 36; *Thompson v. Franks*, 37 Pa. St. 329; *Nicholson v. Taylor*, 31 Pa. St. 128; s. c. 72 Am. Dec. 728; *Nesbit v. Burry*, 25 Pa. St. 208; *Winslow v. Leonard*, 24 Pa. St. 14; s. c. 62 Am. Dec. 354; *Lester v. McDowell*, 18 Pa. St. 92; *Hutchinson v. Hunter*, 7 Pa. St. 140; *Smyth v. Craig*, 3 Watts & S. (Pa.) 20; *Hale v. Huntley*, 21 Vt. 147; *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Hanson v. Meyer*, 6 East, 614. However, a sale of personal property is complete and passes title to the buyer, notwithstanding the thing sold has not been measured or the quantity ascertained, when it is apparent that it was the intention of the seller to transfer the title, and the buyer to accept it. *Fletcher v. Ingram*, 46 Wis. 201; *Morrow v. Reed*, 30 Wis. 88; *Sewell v. Eaton*, 6 Wis. 490; s. c. 70 Am. Dec. 471. See, also, *Tompkins v. Dudley*, 25 N. Y. 274; *Moody v. Brown*, 34 Me. 107; s. c. 56 Am. Dec. 640; *McConihe v. New York & E. R. R. Co.*, 20 N. Y. 495; s. c. 75 Am. Dec. 420; *Hood v. Manhattan Ins. Co.*, 11 N. Y. 541; *Andrews v. Durant*, 11 N. Y. 35, 40; s. c. 62 Am. Dec. 55; *Merritt v. Johnson*, 7 Johns. (N. Y.) 473; s. c. 35 Am. Dec. 289.

In a contract for the construction of

§ 349. Both these contracts being equally legal and valid, it is obvious that whenever a dispute arises as to the true character of an agreement, the question is one rather of fact than of law. The agreement is just what the parties intended to make it. If that intention is clearly and unequivocally manifested, *cadit quæstio*. But parties very frequently fail to express their intentions, or they manifest them so imperfectly as to leave it doubtful what they really mean, and when this is the case, the Courts have applied certain rules of construction, which in most instances furnish conclusive tests for determining the controversy.¹

vessels the title does not pass until the vessel is delivered. *Lyman v. Becannon*, 29 Mich. 471; *People ex rel. Pacific Mail Steamboat Co. v. Comm'rs of Taxes*, 58 N. Y. 247; *McConihe v. New York & E. R. R. Co.*, 20 N. Y. 497; s. c. 75 Am. Dec. 420; *Low v. Austin*, 20 N. Y. 182; *Andrews v. Durant*, 11 N. Y. 35; s. c. 62 Am. Dec. 55; *Halterline v. Rice*, 62 Barb. (N. Y.) 600; *Happy v. Mosher*, 47 Barb. (N. Y.) 503; *Dyckman v. Valiente*, 43 Barb. (N. Y.) 142; s. c. 28 How. (N. Y.) Pr. 347; *Comfort v. Kiersted*, 26 Barb. (N. Y.) 473; *Low v. Austin*, 25 Barb. (N. Y.) 28; *Brown v. Morgan*, 2 Bosw. (N. Y.) 488; *Wright v. O'Brien*, 5 Daly (N. Y.) 56; *Decker v. Furniss*, 3 Duer (N. Y.) 317; *Seymour v. Montgomery*, 1 Keyes (N. Y.) 465; *Coryell v. Perine*, 6 Robt. (N. Y.) 40; *Haney v. Schooner Rosabelle*, 20 Wis. 249.

Where a party buys goods to be delivered to another, at a certain time, before which time they are destroyed by fire or flood, if he bought them under a contract of sale, he must bear the loss, or if he bought them as agent for a second party, the loss will be his principal's. *Black v. Webb*, 20 Ohio, 304; s. c. 55 Am. Dec. 456. See *Jennings v. Gage*, 13 Ill. 610; s. c. 56 Am. Dec. 476; *Low v. Freeman*, 12 Ill. 467; *Garrett v. Crooks*, 15 La. An. 483; *Phillips v. Hunnewell*, 4 Me.

(4 Greenl.) 376; *Shaw v. Nudd*, 25 Mass. (8 Pick.) 9; *Penniman v. Hartshorn*, 13 Mass. 87; *Lovelace v. Stewart*, 23 Mo. 384; *Shields v. Pettie*, 4 N. Y. 122; *Rodee v. Wade*, 47 Barb. (N. Y.) 53; *Kelley v. Upton*, 5 Duer (N. Y.) 336; *McDonald v. Hewett*, 15 Johns. (N. Y.) 351; s. c. 8 Am. Dec. 241; *Brown v. Brooks*, 25 Pa. St. 210; *Roberts v. Beatty*, 2 Pen. & W. (Pa.) 67; s. c. 21 Am. Dec. 410; *Leonard v. Winslow*, 2 Grant Cas. (Pa.) 139; *Lano v. Neale*, 2 Stark. 105.

¹ *As to the intention of the parties and its effect on the sale*, see *ante*, § 348, note 3. Whether the sale is executed, and the title passes to the buyer, depends on the intention of the parties, and this may be shown by circumstances as well as declarations. *Callaghan v. Myers*, 89 Ill. 566, 570. See, also, *Hatch v. Standard Oil Co.*, 100 U. S. (10 Otto) 124, 131; bk. 25, L. ed. 554. There is often great difficulty in determining whether a contract is itself a sale of personal property so as to pass the ownership to the vendee, or whether it is a sale on condition, to take effect or be consummated only when the condition shall be performed, or whether it is a mere agreement to sell. Whether the title passes depends upon the intention of the parties, which is to be gathered from the language of the instrument. *Hatch v. Standard Oil Co.*, 100 U. S. (10 Otto) 124, 131; bk. 25, L. ed. 554;

§ 350. When the specific goods to which the bargain is to attach are not agreed on, it is clear that the parties can only contemplate an executory agreement. If A. buys from B. ten sheep, to be delivered hereafter, or ten sheep out of a flock of fifty, whether A. is to select them, or B. is to choose which he will deliver, or any other mode of separating the ten sheep from the remainder be agreed on, it is plain that no ten sheep in the flock can have changed owners by the *mere contract*,¹ that something more must be done before it can be true that any particular sheep can be said to have ceased to belong to B., and to have become the property of A.²

§ 351. But on the other hand, the goods sold may be specific, as if there be in the case supposed only ten sheep in a

Elgee Cotton Cases, 89 U. S. (22 Wall.) 180, 187; bk. 22, L. ed. 863. See, also, *Terry v. Wheeler*, 25 N. Y. 520, 525; *Sewell v. Eaton*, 6 Wis. 490; s. c. 7 Am. Dec. 471; *Fletcher v. Ingram*, 46 Wis. 191, 201.

¹ *Distinction between sale and contract.* — In a case of sale and delivery of goods the title passes to the vendee, but in a case of mere contract for a sale, the title remains in the original owner until the sale is consummated. *Jennings v. Gage*, 13 Ill. 610; s. c. 56 Am. Dec. 476; *Golder v. Ogden*, 15 Pa. St. 528; s. c. 53 Am. Dec. 618.

² *The property remains in the vendor* under a contract of sale so long as anything remains to be done between the vendor and vendee, for the purpose of ascertaining the amount and price of the article sold. *Ward v. Shaw*, 7 Wend. (N. Y.) 404; *Nicholson v. Taylor*, 31 Pa. St. 128; s. c. 72 Am. Dec. 728. See *Winslow v. Leonard*, 24 Pa. St. 14; *Nesbitt v. Burry*, 25 Pa. St. 208; *Lester v. McDowell*, 18 Pa. St. 92; *Hutchinson v. Hunter*, 7 Pa. St. 140; *Smyth v. Craig*, 3 Watts & S. (Pa.) 20; *Hanson v. Meyer*, 6 East, 614. *Vide ante*, § 348, note 5.

Where no particular goods have been

specified, set apart or distinguished, or where they have been specified, set apart, or distinguished, and something yet remains to be done to them by the vendor before they are ready for delivery, or to ascertain the price, it is an executory contract, and no title passes. *Stephens v. Santee*, 49 N. Y. 35. See *Hurd v. Cook*, 75 N. Y. 454, 459.

Where goods are not set apart or identified in some way, there can be no specific sale as a rule (see *ante*, § 348, note 5); except in those cases specified in note 3 to § 348, *supra*.

Uniform quality and value. — Some cases hold that where the property sold is part of an entire mass of a uniform quality and value, a severance is not necessary to vest the title in the vendee. See *Chapman v. Shepard*, 39 Conn. 413; *Piazzek v. White*, 23 Kan. 621; s. c. 33 Am. Rep. 211; *Cushing v. Breed*, 96 Mass. (14 Allen) 376; *Waldron v. Chase*, 37 Me. 414; s. c. 59 Am. Dec. 56; *Hurff v. Hires*, 40 N. J. L. (11 Vr.) 581; s. c. 29 Am. Rep. 282; *Russell v. Carrington*, 42 N. Y. 118; s. c. 1 Am. Rep. 498; *Kimberly v. Patchin*, 19 N. Y. 330; s. c. 75 Am. Dec. 334; *Pleasants v. Pendleton*, 6 Rand. (Va.) 473; s. c. 18 Am. Dec. 726.

flock, and A. agrees to buy them all. In such case, there may remain nothing to be done to the sheep, and the bargain may be for immediate delivery, or it may be that the vendor is to have the right to shear them before delivery, or may be bound to fatten them, or furnish pasture for a certain time before the buyer takes them, or they may be sold at a certain price, by weight, or various other circumstances may occur which leave it doubtful whether the real intention of the parties is that the sale is to take effect after the sheep have been sheared, or fattened, or weighed, as the case may be, or whether the sheep are to become at once the property of the buyer, subject to the vendor's right to take the wool, or to his obligation to furnish pasturage, or to his duty to weigh them. And difficulties arise in determining such questions, not only because parties fail to manifest their intentions, but because not uncommonly they *have* no definite intentions; because they have not thought of the subject. When there has been no manifestation of intention, the presumption of law is that the contract is an actual sale, if the specific thing is agreed on, and it is ready for immediate delivery; but that the contract is only executory when the goods have not been specified, or if when specified, something remains to be done to them by the vendor, either to put them into a deliverable shape, or to ascertain the price. In the former case, there is no reason for imputing to the parties any intention to suspend the transfer of the property, inasmuch as the thing and the price have been mutually assented to, and nothing remains to be done. In the latter case, where something is to be done to the goods, it is presumed that they intended to make the transfer of the property dependent upon the performance of the things yet to be done, as a condition precedent. Of course, these presumptions yield to proof of a contrary intent, and it must be repeated that nothing prevents the parties from agreeing that the property in a specific thing sold and ready for delivery, is not to pass till certain conditions are accomplished, or that the property shall pass in a thing which remains in the vendor's possession, and is not ready for delivery, as an unfinished ship, or which has not

yet been weighed or measured, as a cargo of corn, in bulk, sold at a certain price per pound, or per bushel.¹

§ 352. The authorities which justify these preliminary observations¹ will now be reviewed, thus placing before the reader the means of arriving at an accurate knowledge of this important branch of the law relating to the sale of

¹ *When property passes.*—The general principles governing this subject have been recently very clearly and concisely stated by Chief Justice Bovill, in the case of *Heilbutt v. Hickson*, L. R. 7 C. P. 449. He says: "Where specific and ascertained existing goods or chattels are the subject of a contract of immediate and present sale, and whether there be a warranty of quality or not, the property generally passes to the purchaser upon the completion of the bargain, and the vendor thereupon has a right to recover the price, unless from other circumstances it can be collected that the intention was that the property should not at once vest in the purchaser. Such an intention is generally shown by the fact of some further act being first required to be done: such as, for instance, in most cases, delivery; in some cases, actual payment of the price; and in other cases, weighing or measuring in order to ascertain the price, or marking, packing, coopering, filling up the casks, or the like. In the case of executory contracts, where the goods are not ascertained, or may not exist at the time of the contract, from the nature of the transaction no property in the goods can pass to the purchaser by virtue of the contract itself; but where certain goods have been selected and appropriated by the seller, and have been approved and assented to by the buyer, then the case stands, as to the vesting of the property, very much in the same position as upon a contract for the sale of goods which are ascertained at the time of the bargain. In most cases of such

executory contracts, something more would generally remain to be done, such as, for instance, selection or appropriation, approval and delivery of some kind, before the property would be considered as intended to pass, and upon that taking place, the property might pass if it was intended to do so, equally as in the case of a contract for specific and ascertained goods." Whether or not the title passes upon an agreement for the sale of personal property, depends upon the intention of the parties to the agreement and the circumstances. *Vide ante*, sec. 348, note 3. See, also, *Chapman v. Shepard*, 39 Conn. 413; *Lester v. East*, 49 Ind. 588; *Dyer v. Libby*, 61 Me. 45; *Bethel Steam Mill Co. v. Brown*, 5 Me. 18; *Stone v. Peacock*, 35 Me. 388; *Morse v. Sherman*, 106 Mass. 433; *Denny v. Williams*, 87 Mass. (5 Allen) 3; *Riddle v. Varnum*, 37 Mass. (20 Pick.) 283; *Macomber v. Parker*, 30 Mass. (13 Pick.) 182; *Sumner v. Hamlet*, 29 Mass. (12 Pick.) 76; *Wilkinson v. Holiday*, 33 Mich. 386; *Cunningham v. Ashbrook*, 20 Mo. 553; *Prescott v. Locke*, 51 N. H. 101, 103; s. c. 12 Am. Rep. 55; *Ockington v. Richey*, 41 N. H. 279; *Kelsea v. Haines*, 41 N. H. 246, 353; *Fuller v. Bean*, 34 N. H. 290; *Russell v. Carrington*, 42 N. Y. 118; s. c. 1 Am. Rep. 498; *Fitch v. Burk*, 38 Vt. 689; *Bellows v. Wells*, 36 Vt. 599; *Barrett v. Goddard*, 3 Mason C. C. 113; *Ogg v. Shuter*, L. R. 10 C. P. 162, 163.

¹ In *Heilbutt v. Hickson*, L. R. 7 C. P. 438, Bovill C. J. laid down the general law on this subject, substantially as it is stated in the above text.

[*263] personal *property. They will be considered in five chapters, having reference to cases.

1. Where the sale is of a specific chattel, unconditionally.
2. Where the chattels are specific, but are sold conditionally.
3. Where the chattels are not specific.
4. Where there is a subsequent appropriation of specific chattels to an executory agreement.
5. Where the *jus disponendi* is reserved.

The effect of obtaining goods by fraud, upon the transfer of the property in them, will be considered in Book III. Ch. 2, on Fraud.

* CHAPTER II. [*264]

SALE OF SPECIFIC CHATTELS UNCONDITIONALLY.

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§ 353. SHEPHERD'S Touchstone, p. 224, gives the common law rules as follows: "If one sell me his horse or any other thing for money or other valuable consideration, and, *First*, the same thing is to be delivered to me at a day certain, and by our agreement a day is set for the payment of the money, or, *Secondly*, all; or, *Thirdly*, part of the money is paid in hand; or, *Fourthly*, I give earnest money, albeit it be but a penny, to the seller; or, *Lastly*, I take the thing bought by agreement into my possession, where no money is paid, earnest given, or day set for the payment, in all these cases there is a *good bargain and sale of the thing to alter the property thereof*. In the *first* case I may have an action for the thing, and the seller for his money; in the *second* case, I may sue for and recover the thing bought; in the *third*, I may sue for the thing bought, and the seller for the residue of the money; in the *fourth* case, where earnest is given, we may have reciprocal remedies, one against another; and in the *last* case, the seller may sue for his money."

§ 354. In Noy's Maxims,¹ the rules are given thus: "In all agreements there must be *quid pro quo presently*, ex-

¹ pp. 87, 89.
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[*265] cept a *day be expressly given for the payment, or else *it is nothing but communication*. . . . If the bargain be that you shall give me 10*l.* for my horse, and you gave one penny in earnest, which I accept, *this is a perfect bargain*, you shall have the horse by an action on the case, and I shall have the money by an action of debt. If I say the price of a cow is 4*l.*, and you say you will give me 4*l.* and do not pay me presently, you cannot have her afterwards without I will, *for it is no contract*; but if you begin directly to tell your money, if I sell her to another, you shall have your action on the case against me. . . . If I sell my horse for money I may keep him until I am paid, but I cannot have an action of debt until he be delivered, *yet the property of the horse is by the bargain in the bargainee or buyer*; but if he presently tender me my money, and I refuse it, he may take the horse, or have an action of detinue, and if the horse die in my stables, between the bargain and delivery, I may have an action of debt for the money, because *by the bargain the property was in the buyer*.²

§ 355. The rules given by these ancient authors remain substantially the law of England to the present time, with but one exception. The maxim of Noy, that unless the money be paid “presently” there is no sale except a day be *expressly* given for the payment, as exemplified in the supposed case of the sale of the cow, is not the law in modern times. The consideration for the sale may have been, and probably was, in those early days the actual payment of the

² *When title passes. — Nothing to be done by other party.* — We have seen (*ante*, sec. 351, note 1. See, also, *Lupin v. Marie*, 6 Wend. (N. Y.) 77; s. c. 21 Am. Dec. 256) that where anything remains to be done, the title of the goods sold does not pass unless the parties intend otherwise; but where nothing remains to be done under the contract of sale either in ascertaining or measuring, appropriating or delivering the property, the title passes and immediately vests in the buyer, and the seller has a right

to the price, unless it is otherwise stipulated by the parties. See *Hanauer v. Bartels*, 2 Colo. 514; *Lester v. East*, 49 Ind. 588; *Townsend v. Hargraves*, 118 Mass. 325, 332; *Haskins v. Warren*, 115 Mass. 533; *Goddard v. Binney*, 115 Mass. 456; s. c. 15 Am. Rep. 112; *Foster v. Ropes*, 111 Mass. 10; *Morse v. Sherman*, 106 Mass. 430; *Jenkins v. Jarrett*, 70 N. C. 255. In Alabama this rule is modified by the code. See *Lehman v. Warren*, 53 Ala. 538. Also Alabama code (1876) sec. 1415.

price, but it has since been held to be the purchaser's obligation to pay the price where nothing shows a contrary intention. In *Simmons v. Swift*,¹ Bayley J. said: "Generally, where a bargain is made for the purchase of goods, and nothing is said about payment or delivery, *the property passes immediately*, so as to cast upon the purchaser all future risk, if nothing remains to be done to the goods, although he cannot take them away without paying the price."² So in *Dixon v. Yates*,³ Parke J. said: "I take it to be clear that *by the law of England the sale of a [*266] specific chattel passes the property in it to the vendee

¹ 5 B. & C. 862.

² *Willis v. Willis*, 6 Dana (Ky.) 48; *Hall v. Richardson*, 16 Md. 396; s. c. 77 Am. Dec. 303; *Arnold v. Delano*, 58 Mass. (4 Cush.) 33; s. c. 50 Am. Dec. 754.

Unconditional sale of specific chattels passes the title at once, and the risk of loss is upon the purchaser, who has the right to immediate possession. See *Levasseur v. Cary* (Me.), 1 New Eng. Rep. 893; *Philips v. Moor*, 71 Me. 78; *Waldron v. Chase*, 37 Me. 414; s. c. 59 Am. Dec. 56; *Wilkie v. Day*, 141 Mass. 68; s. c. 2 New Eng. Rep. 219; *Gibbons v. Robinson* (Mich.), 5 West. Rep. 740; *Cohen v. Stewart*, (N. C.) (decided Nov. 7, 1887); *Baldwin v. Doubleday*, 59 Vt. 7; s. c. 4 New Eng. Rep. 124.

Sale of coal. — Where a landowner granted a right to mine coal, and the grantee contracted to mine the coal and pay a specific price per ton, it was held that the instrument was a sale of the coal, notwithstanding the fact that the parties contract as lessor and lessee (*Delaware L. & W. R. R. Co. v. Sanderson*, 109 Pa. St. 583; s. c. 1 Cent. Rep. 102); and a lease taken in accordance with such contract, which provides that the property shall continue to be the property of the lessor, until a certain sum has been paid, at which time the lessor would execute a bill of sale, this is a conditional sale and not

a bailment. *Mobley v. Morgan* (Pa.), 5 Cent. Rep. 527; *Cooper v. Whitmer* (Pa.), 5 Cent. Rep. 197; *Brunswick & Balke Co. v. Hoover*, 95 Pa. St. 508; s. c. 40 Am. Rep. 674.

Sale of animals. — Where defendant bartered a steer to plaintiff, if he could find it, both supposing it to be lost, the sale is binding; and if the defendant afterward obtains possession of the steer and sells it to a third person, he is liable for conversion. *Nance v. Metcalf*, 19 Mo. App. 183; s. c. 1 West. Rep. 441.

Same. — *Liability of purchaser for loss by death*. — Where the defendant sold to the plaintiff a drove of horses, which were then running at large, for a stipulated price, and guaranteed that when gathered up they would amount to a certain number, and between the date of the sale and the gathering up of the horses two of them died, it was held that the purchaser must suffer the loss. *Girdner v. Beswick*, 69 Cal. 112.

Sale of shares of stock of a railroad corporation, at a specified price, "payable and deliverable, seller's option, in this year, with interest at the rate of 6 per cent per annum," effects a sale *in presenti*, the vendor becomes *quasi-trustee* for the purchaser, and the latter is entitled to all dividends accruing thereafter. *Currie v. White*, 45 N. Y. 822.

³ 5 A. & E. 313, 340.

without delivery. . . . Where there is a sale of goods generally, no property in them passes till delivery, because until then the very goods sold are not ascertained. But where by the contract itself, *the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel* and to pay the stipulated price, the parties are then in the same situation as they would be after a delivery of goods in pursuance of a general contract. The very appropriation of the chattel is *equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel and to pay the price is equivalent to his accepting possession. The effect of the contract, therefore, is to vest the property in the bargainee.*"⁴

§ 356. The principles so clearly stated by these two eminent judges are the undoubted law at the present time.¹

⁴ *Buffington v. Ulen*, 7 Bush (Ky.) 231; *Crawford v. Smith*, 7 Dana (Ky.) 59, 60; *Willis v. Willis*, 6 Dana (Ky.) 48; *Sweeney v. Owsley*, 14 B. Mon. (Ky.) 413; *Carpenter v. First Nat. Bank*, 119 Ill. 352; s. c. 7 West. Rep. 697; *Seckel v. Scott*, 66 Ill. 106; *Kohl v. Lindley*, 39 Ill. 195; *Wade v. Moffett*, 21 Ill. 110; s. c. 74 Am. Dec. 79; *Lester v. East*, 49 Ind. 588; *Brown v. Wade*, 42 Iowa, 647; *Taylor v. Twenty-five Bales of Cotton*, 26 La. An. 247; *Phillips v. Moore*, 71 Me. 78; *Chase v. Willard*, 57 Me. 157; *Hotchkiss v. Hunt*, 49 Me. 213; *Webber v. Davis*, 44 Me. 147; s. c. 69 Am. Dec. 87; *Means v. Williamson*, 37 Me. 556; *Waldron v. Chase*, 37 Me. 414; s. c. 59 Am. Dec. 56; *Wing v. Clark*, 24 Me. 386; *Merrill v. Parker*, 24 Me. 89; *Gough v. Edelen*, 5 Gill (Md.) 101; *Townsend v. Hargraves*, 118 Mass. 325, 332; *Goddard v. Binney*, 115 Mass. 450, 455; s. c. 15 Am. Rep. 112; *Morse v. Sherman*, 106 Mass. 430, 432; *Martin v. Adams*, 104 Mass. 262; *Marble v. Moore*, 102 Mass. 443; *Merchants' National Bank v. Bangs*, 102 Mass. 295; *Warden v. Marshall*, 99 Mass. 305; *Thayer v. Lapham*, 95 Mass.

(18 Allen) 28; *Gardner v. Lane*, 91 Mass. (9 Allen) 498; *Rice v. Codman*, 83 Mass. (1 Allen) 377; *Bonn v. Haire*, 40 Mich. 404; *Cunningham v. Ashbrook*, 20 Mo. 553; *Uhl v. Robinson*, 8 Neb. 272, 278; *Bailey v. Smith*, 43 N. H. 143; *Felton v. Fuller*, 29 N. H. 121; *Page v. Carpenter*, 10 N. H. 77; *Bigler v. Hall*, 54 N. Y. 167; *Terry v. Wheeler*, 25 N. Y. 520, 524, 525; *Olyphant v. Baker*, 5 Den. (N. Y.) 379; *De Foncleare v. Shottenkirk*, 3 Johns. (N. Y.) 170; *Jenkins v. Jarrett*, 70 N. C. 255; *Hurlburt v. Simpson*, 3 Ired. (N. C.) L. 283; *Hooban v. Bidwell*, 16 Ohio, 509; s. c. 47 Am. Dec. 386; *Winslow v. Leonard*, 24 Pa. St. 14, 17; s. c. 62 Am. Dec. 354; *Frazer v. Hilliard*, 2 Strobh. (S. C.) 309; *Leonard v. Davis*, 66 U. S. (1 Black) 476, 483; bk. 17, L. ed. 222; *Barrett v. Goddard*, 3 Mason C. C. 107, 110.

¹ *Hinde v. Whitehouse*, 7 East, 558; *Tarling v. Baxter*, 6 B. & C. 360; *Martindale v. Smith*, 1 Q. B. 389; *Spartali v. Benecke*, 10 C. B. 212; *Gilmour v. Supple*, 11 Moo. P. C. 551; *The Calcutta Company v. De Mattos*, 32 L. J. Q. B. 322; *Wood v. Bell*, 6 E. & B. 355; 25

Thus, in *Tarling v. Baxter*,¹ the defendant agreed to sell to the plaintiff a certain stack of hay for 145*l.*, payable on the ensuing 4th of February, and to be allowed to stand on the premises until the first day of May. This was held to be an immediate, not a prospective sale, although there was also a stipulation that the hay was not to be cut till paid for. Bayley J. said: "The rule of law is that where there is an immediate sale and nothing remains to be done by the vendor as between him and the vendee, *the property in the thing sold vests in the vendee.*" This case was followed by one, presenting very similar features, in the Queen's Bench in 1841.²

§ 357. In *Gilmour v. Supple*,¹ Sir Creswell Cresswell, in giving an elaborate judgment of the Privy Council, says: "By the *law of England, by a contract for [*267] the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties." And in *The Calcutta Company v. De Mattos*,² in 1863, Blackburn J. pronounced this to be a very accurate statement of the law."³

L. J. Q. B. 148, and in *Ex. Ch.* 321; *Chambers v. Miller*, 10 C. B. N. S. 125; 35 L. J. C. P. 30; *Furley v. Bales*, 2 H. & C. 200; 33 L. J. Ex. 43; *Joyce v. Swan*, 17 C. B. N. S. 84.

² *Martindale v. Smith*, 1 Q. B. 389. See, also, *Chinery v. Vial*, 5 H. & N. 228; and 29 L. J. Ex. 180; *Sweeting v. Turner*, L. R. 7 Q. B. 310.

¹ 11 Moo. P. C. 566.

² 32 L. J. Q. B. 322, 328. See *Brewster v. Leith*, 1 Minn. 56.

³ *Identification of property*.—Where the goods sold are identified by the contract, the title will pass, though they be mingled with other goods. See *Ropes v. Lane*, 91 Mass. (9 Allen) 502, 510; *Arnold v. Delano*, 58 Mass. (4 Cush.) 33, 40; s. c. 50 Am. Dec. 754.

Measuring and setting apart goods are not essential to a perfect sale, except in those cases where it is necessary in order to define the sub-

ject-matter of the sale. *Winslow v. Leonard*, 24 Pa. St. 14; s. c. 62 Am. Dec. 354. See *Riddle v. Varnum*, 37 Mass. (20 Pick.) 280; *Sumner v. Hamlet*, 29 Mass. (12 Pick.) 76; *Clark v. Baker*, 46 Mass. (5 Metc.) 452; *Macomber v. Parker*, 30 Mass. (13 Pick.) 175; *Shindler v. Houston*, 1 Den. (N. Y.) 48; *Sands v. Taylor*, 5 Johns. (N. Y.) 395; s. c. 4 Am. Dec. 374; *Scott v. Wells*, 6 Watts & S. (Pa.) 357; s. c. 40 Am. Dec. 568; *Smyth v. Craig*, 3 Watts & S. (Pa.) 14; *Pleasants v. Pendleton*, 6 Rand. (Va.) 473; s. c. 18 Am. Dec. 726; *Hawes v. Watson*, 2 Barn. & Cress. 540; *Valpy v. Gibson*, 4 C. B. 804.

Where something remains to be done, as a rule, the title will not pass to the vendee. See, *ante*, sec. 343, note 6; also, *Smith v. Dallas*, 35 Ind. 255; *Willis v. Willis*, 6 Dana (Ky.) 49; *Thorndike v. Bath*, 114 Mass.

116; s. c. 19 Am. Rep. 318; *Marble v. Moore*, 102 Mass. 443; *Thayer v. Lapham*, 95 Mass. (13 Allen) 26; *Whitcomb v. Whitney*, 24 Mich. 486; *Terry v. Wheeler*, 25 N. Y. 520; *Bates v. Coster*, 3 T. & C. (N. Y.) 580; *Joyce v. Adams*, 8 N. Y. 296; *Thompson v. Franks*, 37 Pa. St. 329; *Sewell v. Eaton*, 6 Wis. 490; s. c. 70 Am. Dec. 471. See *Marble v. Moore*, 102 Mass. 443; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 295; *Beecher v. Mayall*, 82 Mass. (16 Gray) 376; *Riddle v. Varnum*, 37 Mass. (20 Pick.) 280; *Macomber v. Parker*, 30 Mass. (13 Pick.) 175; *Bemis v. Morrill*, 38 Vt. 153; *Fletcher v. Ingram*, 46 Wis. 191; *Morrow v. Reed*, 30 Wis. 88; *Young v. Matthews*, L. R. 2 C. P. 127; *Martineau v. Kitching*, L. R. 7 Q. B. 449; *Tarling v. Baxter*, 6 Barn. & Cress. 360; *Phillips v. Bistoli*, 2 Barn. & Cress. 511; *Falk v. Fletcher*, 18 C. B. N. S. 403; s. c. 11 Jur. N. S. 176; *Rugg v. Minett*, 11 East, 210.

Where something remains to be done for the purpose of testing the property or fixing the amount to be paid, by selecting, weighing, measuring, counting, or the like, the property will pass before that act is done, where it is plain from the contract that such was the intention of the parties. *Burr v. Williams*, 23 Ark. 244; *Ford v. Chambers*, 28 Cal. 13; *Cummins v. Griggs*, 2 Duv. (Ky.) 87; *Cushman v. Holyoke*, 34 Me. 289; *Denny v. Williams*, 87 Mass. (5 Allen) 3; *Riddle v. Varnum*, 37 Mass. (20 Pick.) 283; *Russell v. Carrington*, 42 N. Y. 118; s. c. 1 Am. Rep. 498; *Terry v. Wheeler*, 25 N. Y. 525; *Filkins v. Whyland*, 24 N. Y. 238; *Williams v. Adams*, 3 Sneed. (Tenn.) 359; *Fitch v. Burk*, 38 Vt. 683; *Jenner v. Smith*, L. R. 4 C. P. 270; *Castle v. Playford*, L. R. 7 Ex. 98; *Alexander v. Gardner*, 1 Bing. (N. C.) 671; *Turley v. Bates*, 2 Hurl. & C. 200; *Stone v. Peacock*, 35 Me. 388; *Morse v. Sherman*, 106 Mass. 430; *Fuller v. Bean*, 34 N. H. 300;

Bellows v. Wells, 36 Vt. 599; *Young v. Matthews*, L. R. 2 C. P. 127.

The question of intention is always one of fact for the jury (*McClung v. Kelly*, 21 Iowa, 508; *George v. Stubbs*, 26 Me. 250; *Riddle v. Varnum*, 37 Mass. (20 Pick.) 283; *De Ridder v. McKnight*, 13 Johns. (N. Y.) 294); unless it is plain, as a matter of law, that the evidence will justify a finding but one way. *Stevens v. Boston & W. R. R. Co.*, 74 Mass. (8 Gray) 262; *Stanton v. Eager*, 33 Mass. (16 Pick.) 473; *Allen v. Williams*, 29 Mass. (12 Pick.) 297; *Moakes v. Nicolson*, 19 C. B. (N. S.) 290; *Godts v. Rose*, 17 C. B. 229; *Tregelles v. Sewell*, 7 Hurl. & N. 574.

Where a vendee accepts property sold and assumes the control thereof, he is vested with title at once, although the property had never been measured, and the exact amount ascertained. *Baldwin v. Doubleday* (Vt.), 4 New Eng. Rep. 124. See, also, *Carpenter v. First Nat. Bank*, 119 Ill. 352; s. c. 7 West. Rep. 697; *Terry v. Wheeler*, 25 N. Y. 520. See *Hurff v. Hires*, 40 N. J. L. (11 Vr.) 581; s. c. 29 Am. Rep. 282, 286. See *MacNamara v. Edmister*, 11 Hun (N. Y.) 601. But see *Ferguson v. Northern Bank of Kentucky*, 14 Bush (Ky.) 555; s. c. 29 Am. Rep. 418; also, *Burrows v. Whitaker*, 71 N. Y. 291; s. c. 27 Am. Rep. 42.

Thus a sale of logs to be delivered at a particular place, where such logs are designated by a mark, is sufficient to pass the title at once to the purchaser, although the logs are to be "driven by a party mutually agreed upon, and afterwards delivered at a designated place." See *Walden v. Murdock*, 23 Cal. 540; *Bertelson v. Bower*, 81 Ind. 512; *Cummins v. Griggs*, 2 Duv. (Ky.) 87; *Dyer v. Libby*, 61 Me. 45; *Bethel Steam Mill Co. v. Brown*, 57 Me. 9; *Russell v. Carrington*, 42 N. Y. 118; s. c. 1 Am. Rep. 498; *Filkins v. Whyland*, 24 N. Y. 238.

*CHAPTER III. [*268]

SALE OF SPECIFIC CHATTELS CONDITIONALLY.

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§ 358. Two rules on this subject are stated by Lord Blackburn,¹ as follows: —

First. — Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is to be bound to accept them, or, as it is sometimes worded, into a deliverable state, the performance of those things shall, in the absence of circum-

¹ On Sale, pp. 151-2.

stances indicating a contrary intention, be taken to be a condition precedent to the vesting of the property.²

² See *Straus v. Ross*, 25 Ind. 300; *McClung v. Kelley*, 21 Iowa, 508; *Foster v. Ropes*, 111 Mass. 10; *Marhee v. Moore*, 102 Mass. 443; *Bailey v. Smith*, 43 N. H. 141; *Gilbert v. New York Cent. R. R. Co.*, 4 Hun (N. Y.) 378; *Paton v. Currie*, 19 Up. Can. Q. B. 388.

Sale conditional, vendor to do something.—In order to constitute a conditional sale, it is essential that the title to the property should remain in the vendor, because there is no conditional sale where the title is transferred to the vendee. *Frick v. Hilliard*, 95 N. C. 117. See, also, *Batchelder v. Jenness*, 59 Vt. 104; s. c. 3 New Eng. Rep. 379; Vt. Rev. Laws, 992.

A consignment of goods by one merchant to another, to be sold on commission, is not a sale, lease, hiring, or delivery of goods, on condition that the title should pass to the vendee or lessee or other person on payment of the price or value of the property when sold, within the provisions of Statute of Frauds, providing that such conditions shall be void as to subsequent purchasers in good faith, against creditors, unless the same is recorded as in cases as chattel mortgages. *Peet v. Spencer*, 90 Mo. 384; s. c. 7 West. Rep. 286; Mo. Rev. Stat. (1879) § 257.

Giving mortgage back.—An agreement to sell another personal property on credit, provided the buyer will give a mortgage back to secure the purchase money, is not a sale, conditional or unconditional. *Brunswick v. Martin*, 20 Mo. App. 158; s. c. 2 West. Rep. 534, 535; *Rutherford v. Stewart*, 79 Mo. 216; *Frank v. Playter*, 73 Mo. 672; *Wright v. Bircher*, 72 Mo. 179; s. c. 37 Am. Rep. 433. See, also, *Cass v. Gunnison*, 58 Mich. 108; s. c. 12 West. Rep. 508.

Parol evidence to prove conditional

sale.—In a suit between a vendor and creditor of the vendee, parol evidence is not admissible to prove that a sale is conditional when it is evidenced by a writing that imports an absolute sale, where the creditor made his attachment, relying upon the writing and the vendee's representations that the sale was as the writing showed it to be. See *Allen v. Maury*, 66 Ala. 10; *Block Bros. v. Maas*, 65 Ala. 211; *Leigh v. Mobile & Ohio R. R. Co.*, 58 Ala. 165; *McCrae v. Young*, 43 Ala. 622; *Browning v. Hamilton*, 42 Ala. 484; *Jones v. Pearce*, 25 Ark. 545; *Kaufman v. Stone*, 25 Ark. 336; *Goembel v. Arnett*, 100 Ill. 34; *Gravett v. Mugge*, 89 Ill. 218; *Burns v. Mays*, 88 Ill. 233; *Frost v. Woodruff*, 54 Ill. 155; *Kohl v. Lindley*, 39 Ill. 195; *Lester v. East*, 49 Ind. 588; *Straus v. Ross*, 25 Ind. 300; *McClung v. Kelly*, 21 Iowa, 508; *Abat v. Atkinson*, 21 La. An. 414; *Morrison v. Dingley*, 63 Me. 553; *Dyer v. Libby*, 61 Me. 45; *Chase v. Willard*, 57 Me. 157; *Stone v. Peacock*, 35 Me. 385, 388; *Houdlette v. Tallman*, 14 Me. 400; *Townsend v. Hargraves*, 118 Mass. 325, 332; *Foster v. Ropes*, 111 Mass. 10; *Morse v. Sherman*, 106 Mass. 430; *Marble v. Moore*, 102 Mass. 443; *Ropes v. Lane*, 93 Mass. (11 Allen) 591; *Arnold v. Delano*, 58 Mass. (4 Cush.) 40; s. c. 50 Am. Dec. 754; *Riddle v. Varnum*, 37 Mass. (20 Pick.) 280; *Mason v. Thompson*, 35 Mass. (18 Pick.) 305; s. c. 20 Am. Dec. 471; *Macomber v. Parker*, 30 Mass. (13 Pick.) 175, 183; *Sumner v. Hamlet*, 29 Mass. (12 Pick.) 82; *Higgins v. Chessman*, 26 Mass. (9 Pick.) 7; *Shaw v. Nudd*, 25 Mass. (8 Pick.) 9; *Damon v. Osborn*, 18 Mass. (1 Pick.) 476; s. c. 11 Am. Dec. 229; *Jewett v. Warren*, 12 Mass. 300; s. c. 7 Am. Dec. 74; *Brewer v. Mich. Salt Ass.*, 47 Mich. 526; *Wilkinson v. Holiday*, 33 Mich. 386;

§ 359. *Secondly*.—Where anything remains to be done to the goods, for the purpose of ascertaining the price, as by

Hahn v. Fredericks, 30 Mich. 223; s. c. 18 Am. Rep. 119; Lingham v. Eggleston, 27 Mich. 324; Begole v. McKenzie, 26 Mich. 470; Ortman v. Green, 26 Mich. 209; Adams Mining Co. v. Senter, 26 Mich. 73, 79, 80; Whitcomb v. Whitney, 24 Mich. 486; Southwestern Freight, &c. Co. v. Stanard, 44 Mo. 71; Smart v. Batchelder, 57 N. H. 140; Prescott v. Locke 51 N. H. 94; s. c. 12 Am. Rep. 55; Bailey v. Smith, 43 N. H. 141; Gilman v. Hill, 36 N. H. 311, 320; Fuller v. Bean, 34 N. H. 290, 300, 301; Messer v. Woodman, 22 N. H. 172; Davis v. Hill, 3 N. H. 382; s. c. 14 Am. Dep. 373; Burrows v. Whitaker, 71 N. Y. 291; Kein v. Tupper, 52 N. Y. 550; Bradley v. Wheeler, 44 N. Y. 495; Terry v. Wheeler, 25 N. Y. 520; Decker v. Furniss, 14 N. Y. 611; Crofoot v. Bennett, 2 N. Y. 260; Hyde v. Lathrop, 2 Abb. (N. Y.) App. Dec. 436; Dexter v. Norton, 55 Barb. (N. Y.) 272; Comfort v. Kiersted, 26 Barb. (N. Y.) 272; Tyler v. Strang, 21 Barb. (N. Y.) 198; Outwater v. Dodge, 7 Cow. (N. Y.) 85; Rapelye v. Mackie, 6 Cow. (N. Y.) 250; Russell v. Nicholl, 3 Wend. (N. Y.) 112; s. c. 20 Am. Dec. 670; Downer v. Thompson, 2 Hill (N. Y.) 137; McDonald v. Hewett, 15 Johns. (N. Y.) 849; s. c. 8 Am. Dec. 241; Keeler v. Vandervere, 5 Lans. (N. Y.) 313; Ormsbee v. Machir, 20 Ohio St. 295; Woods v. McGee, 7 Ohio St. 128; Dennis v. Alexander, 3 Pa. St. 50; Dixon v. Blonadin, 58 Vt. 689; s. c. 2 New Eng. Rep. 777; Gibbs v. Benjamin, 45 Vt. 124; Hutchins v. Gilchrist, 23 Vt. 88; Hale v. Huntley, 21 Vt. 147; Barrett v. Goddard, 3 Mason C. C. 107; Reynolds v. Ayers, 5 Allen (N. B.) 333; Gibson v. Kean, 3 Pugs. (N. B.) 299; Hannington v. Cormier, 3 Pugs. (N. B.) 212; Allington v. O'Mahoney, 1 Pugs. (N. B.) 326; Sprague

v. King, 1 Pugs. & B. (N. B.) 241; Johnson v. Lancashire & Y. R. W. Co., 3 C. P. D. 499; Steele v. Grand Trunk Ry., 31 Up. Can. C. P. 260; Tufts v. Mottashed, 29 Up. Can. C. P. 539; Lockhart v. Pannell, 2 Up. Can. C. P. 597; 2 Kent, 496; Pothier Cont. of Sales, by Cushing, §§ 309, 311.

Conditional sale, measuring, testing, weighing, etc.—Where the vendor proposes to sell a machine on its merits, and states in his letter, "If it will not do all I claim, you need not buy," and the testimony showed there was a series of experiments and failures, and that changes were made by plaintiff and his agent, and that defendants were unwilling to keep the machine, and that plaintiff urged further experiment, and that finally defendants refused to retain it, an absolute sale was not shown. Gurney v. Collins (Mich.) 7 West. Rep. 670. And where personal property is actually sold and delivered, and the amount to be paid for it to be ascertained by measuring, weighing, or counting, the matter of measuring, weighing, or counting will be considered as referred to the adjustment and settlement of the accounts. McMillion v. Schweitzer, 87 Mo. 402; s. c. 3 West. Rep. 232. See Ober v. Carron's Exr., 62 Mo. 213. Thus a contract for the sale of standing millet, which provides that it should be cut and stacked on the farm of the vendor, and within thirty days be measured and paid for, does not vest the title to the millet in the vendee until it has been measured and paid for according to the contract. Hughes v. Wiley, 36 Kan. 731.

It has been held that a contract to furnish ties to a railroad company, whereby vendor was to pile the ties on land of the company, and was thereupon to receive a part of the

weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained, and they are in the state in which they ought to be accepted.

§ 360. *Third Rule.*—These may be added, *Thirdly.*—Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.¹

price, and the ties were to be thereafter inspected and selected, and the balance of the price was to be paid when the ties were taken and used, did not contemplate that the title should pass on vendor's piling the ties on the land and receiving the part payment thereon. *Cornell v. Clark*, 104 N. Y. 451; s. c. 6 Cent. Rep. 506.

Where an iron press was bargained by the pound, and it had to be weighed to ascertain the number of pounds, and the purchase price, it was held that the contract was executory, but that if the price was fixed, and the delivery was perfect, the contract was executed. *Butler v. Lawsher*, 74 Ga. 352. See to same effect *Amer v. Hightower*, 70 Cal. 440; *Thompson v. Libby*, 35 Minn. 443; *Cornell v. Clark*, 104 N. Y. 457; s. c. 6 Cent. Rep. 506.

¹ An agreement as to price is valid and binding although the goods were not in existence where they are subsequently delivered under such contract. *Sumner v. Woods*, 67 Ala. 139; *Fairbanks v. Eureka Co.*, 67 Ala. 109; s. c. 42 Am. Rep. 105 (note); *Dudley v. Abner*, 52 Ala. 572; *Sewell v. Henry*, 9 Ala. 24; *Rawls v. Saulsbury*, 66 Ga. 394, 396;

Everett v. Hall, 67 Me. 497; *Bunker v. McKenney*, 63 Me. 529; *Brown v. Haynes*, 52 Me. 578; *Hotchkiss v. Hunt*, 49 Me. 219; *Sawyer v. Fisher*, 32 Me. 23; *George v. Stubbs*, 26 Me. 243; *Tibbetts v. Towle*, 12 Me. (3 Fairf.) 341; *Shaffer v. Sawyer*, 123 Mass. 294; *Chase v. Ingalls*, 122 Mass. 381; *Benner v. Puffer*, 114 Mass. 376; *Zuchtmann v. Roberts*, 109 Mass. 53; s. c. 12 Am. Rep. 663; *Booraem v. Crane*, 103 Mass. 522; *Hirschorn v. Canney*, 98 Mass. 149; *Whitney v. Eaton*, 81 Mass. (15 Gray) 225; *Riddle v. Coburn*, 74 Mass. (8 Gray) 241; *Deshon v. Bigelow*, 74 Mass. (8 Gray) 159; *Burbank v. Crooker*, 73 Mass. (7 Gray) 158; s. c. 66 Am. Dec. 470; *Blanchard v. Child*, 73 Mass. (7 Gray) 155; *Sargent v. Metcalf*, 71 Mass. (5 Gray) 306; *Gilbert v. Thompson*, 69 Mass. (3 Gray) 550 (note); *Coggill v. Hartford & N. H. R. R. Co.*, 69 Mass. (3 Gray) 545; *Heath v. Randall*, (4 Cush.) 53 Mass. 195; *Fairbank v. Phelps*, 39 Mass. (22 Pick.) 535; *Vincent v. Cornell*, 30 Mass. (13 Pick.) 294; s. c. 23 Am. Dec. 683; *Barrett v. Pritchard*, 19 Mass. (2 Pick.) 512; s. c. 13 Am. Dec. 449; *Hussey v. Thornton*, 4 Mass. 405; s. c. 3 Am. Dec. 224;

Marquette Mfg. Co. v. Jeffery, 49 Mich. 283; Smith v. Lozo, 42 Mich. 6; Giddey v. Altman, 27 Mich. 206; Fifield v. Elmer, 25 Mich. 48; Preston v. Whitney, 23 Mich. 260; Dunlap v. Gleason, 16 Mich. 158; Couse v. Tregent, 11 Mich. 65; Sumner v. Gottey, 71 Mo. 121; Wangler v. Franklin, 70 Mo. 659; Ridgeway v. Kennedy, 52 Mo. 24; Little v. Page, 44 Mo. 412; Porter v. Pettengill, 12 N. H. 299; Davis v. Emery, 11 N. H. 230; Lucy v. Bundy, 9 N. H. 298; s. c. 32 Am. Dec. 358; Bean v. Edge, 84 N. Y. 510; Cole v. Berry, 42 N. J. L. (13 Vr.) 308; s. c. 36 Am. Rep. 511; Hasbrouck v. Lounsbury, 26 N. Y. 593; Herring v. Hoppeck, 15 N. Y. 409; Lees v. Richardson, 2 Hilt. (N. Y.) 164; Parris v. Roberts, 12 Ired. (N. C.) L. 268; Sage v. Sleutz, 23 Ohio St. 1; Carpenter v. Scott, 13 R. I. 477; Bennett v. Sims, 1 Rice (S. C.) 421; Buson v. Dougherty, 11 Humph. (Tenn.) 50; Gambling v. Read, 1 Meigs (Tenn.) 231, 234, 236; Duncan v. Stone, 45 Vt. 118; Armington v. Houston, 38 Vt. 448; Davis v. Bradley, 24 Vt. 55; s. c. 65 Am. Dec. 226; Root v. Lord, 23 Vt. 563; Buckmaster v. Smith, 22 Vt. 203; Smith v. Foster, 18 Vt. 132; Bigelow v. Huntley, 3 Vt. 151; West v. Bolton, 4 Vt. 558; Wood M. & R. Co. v. Brooke, 2 Sawy. C. C. 576; Copland v. Bosquet, 4 Wash. C. C. 583; Lambert v. McCloud, 63 Cal. 162; s. c. 15 Rep. 780; Cheney v. East, S. L. 59 Md. 557; s. c. 15 Rep. 751; Mason v. Johnson, 27 Up. Can. C. P. 208; Henry v. Cook, 3 Up. Can. C. P. 29.

Sale by conditional vendee. — Where the conditional vendee obtains possession without the knowledge and consent of the vendor and subsequently sells the goods to a *bonâ fide* purchaser, such purchaser acquires a valid title thereto. McCall v. Powell, 64 Ala. 254; Dudley v. Abner, 52 Ala. 572; Sumner v. Woods, 52 Ala. 94; Weaver v. Lapsley, 42 Ala. 601; Brown v. Fitch, 43 Conn. 512; Cragin v. Coe, 29 Conn. 51; Tomlinson v. Roberts, 25 Conn. 477; Hart v. Carpenter, 24 Conn. 427; Forbes v. Marsh, 15 Conn. 384, 397, 398; Van Duzor v. Allen, 90 Ill. 499; Lucas v. Campbell, 88 Ill. 447; Murch v. Wright, 46 Ill. 487; Gibbs v. Jones, 46 Ill. 319; McCormick v. Hadden, 37 Ill. 370; Brundage v. Camp, 21 Ill. 330; Jennings v. Gage, 13 Ill. 610; s. c. 56 Am. Dec. 476; Waters v. Cox, 2 Ill. App. 129; Jordan v. Easter, 2 Ill. App. 73; Dunbar v. Rawles, 28 Ind. 225; Shireman v. Jackson, 14 Ind. 459; Thorpe v. Fowler, 57 Iowa, 541; Moseley v. Shattuck, 43 Iowa, 540; Mowbray v. Cady, 40 Iowa, 604; Baker v. Hall, 15 Iowa, 277; Robinson v. Chapline, 9 Iowa, 91; Bailey v. Harris, 8 Iowa, 331; Greer v. Church, 13 Bush (Ky.) 430; Vaughn v. Hopson, 10 Bush (Ky.) 337; Boynton v. Libby, 62 Me. 253; Stone v. Perry, 60 Me. 48; Drew v. Smith, 59 Me. 393; Rawson v. Tuel, 47 Me. 506; Chase v. Ingalls, 122 Mass. 381; Deshon v. Bigelow, 74 Mass. (8 Gray) 159, 160; Gilbert v. Thompson, 69 Mass. (3 Gray) 550 note; King v. Bates, 57 N. H. 446; McFarland v. Farmer, 42 N. H. 386; Sargent v. Gile, 8 N. H. 325; Cole v. Berry, 42 N. J. L. (13 Vr.) 308; s. c. 36 Am. Rep. 511; Dows v. Kidder, 84 N. Y. 121; Comer v. Cunningham, 77 N. Y. 391; s. c. 33 Am. Rep. 626; Ballard v. Burgett, 40 N. Y. 314; Wait v. Green, 36 N. Y. 556; Smith v. Lynes, 5 N. Y. 41; Hintermister v. Lane, 27 Hun (N. Y.) 497; Walker v. Mitchell, 25 Hun (N. Y.) 527; Fleeman v. McKean, 25 Barb. (N. Y.) 474; Devlin v. O'Neill, 6 Daly (N. Y.) 305; Beavers v. Lane, 6 Duer (N. Y.) 233; Haggerty v. Palmer, 6 John. Ch. (N. Y.) 437; Rawls v. Deshler, 8 Keyes (N. Y.) 572; Martin v. Mathiot, 14 Serg. & R. (Pa.) 214; s. c. 16 Am. Dec. 491; Brunswick v. Hoover, 95 Pa. St. 508; s. c. 24 Alb. L. J. 186; Krause v. Commonwealth, 93 Pa. St. 418; s. c. 39 Am. Rep. 762; Stadtfeld v. Hunts-

man, 92 Pa. St. 53; s. c. 37 Am. Rep. 661; *Rose v. Story*, 1 Pa. St. 190; *Whitcomb v. Woodworth*, 54 Vt. 544; *Bugbee v. Stevens*, 53 Vt. 389; *Phelps v. Hubbard*, 51 Vt. 489; *Towner v. Bliss*, 51 Vt. 59; *Kelsey v. Kendall*, 48 Vt. 24; *Duncan v. Stone*, 45 Vt. 123; *Fales v. Roberts*, 38 Vt. 503; *Hefflin v. Bell*, 30 Vt. 134; *Fosdick v. Schall*, 99 U. S. (9 Otto) 235; bk. 25, L. ed. 339; *Hart v. Barney, &c. Manuf. Co.*, 7 Fed. Rep. 552.

Where the contract is one in the nature of a bailment with a discretionary conditional agreement, whereby the purchaser is to acquire the title, if such condition has not been performed a purchaser from the bailee acquires no title to the property. *Comer v. Cunningham*, 77 N. Y. 398; s. c. 33 Am. Rep. 626; *Austin v. Dye*, 46 N. Y. 500; *Bullard v. Burgett*, 40 N. Y. 314; *Herring v. Hop-pock*, 15 N. Y. 409; *Christie v. Scott's App.*, 85 Pa. St. 463; *Enlow v. Klein*, 79 Pa. St. 488; *Haak v. Linderman*, 64 Pa. St. 499; s. c. 3 Am. Rep. 612; *Rowe v. Sharp*, 51 Pa. St. 27; *Chamberlain v. Smith*, 44 Pa. St. 431; *Clark v. Jack*, 7 Watts (Pa.) 375; *Myers v. Harvey*, 2 P. & W. (Pa.) 478; s. c. 23 Am. Dec. 60; see, also, *Chase v. Ingalls*, 122 Mass. 383; *Currier v. Knapp*, 117 Mass. 324; *Crompton v. Pratt*, 105 Mass. 255; 258; *Day v. Bassett*, 102 Mass. 445; *Devlin v. O'Neill*, 6 Daly (N. Y.) 305; *Carpenter v. Scott*, 13 R. I. 477.

Where there is a condition present title does not pass until that condition is performed. *Carroll v. Wiggins*, 30 Ark. 402; *Hegler v. Eddy*, 53 Cal. 597; *Cardinell v. Bennett*, 52 Cal. 476; *Brown v. Fitch*, 43 Conn. 512; *Flanders v. Maynard*, 58 Ga. 56; *Jowers v. Blandy*, 58 Ga. 379; *Waters v. Cox*, 2 Ill. App. 129; *Domestic Sewing Machine Co. v. Arthurhultz*, 63 Ind. 322; *Hodson v. Warner*, 60 Ind. 214; *Bradshaw v. Warner*, 54 Ind. 58; *Sims v. Wilson*, 47 Ind. 226; *Dunbar v. Rawles*, 28

Ind. 225; *Plummer v. Shirley*, 16 Ind. 380; *Shireman v. Jackson*, 14 Ind. 459; *Thomas v. Winters*, 12 Ind. 322; *Chisson v. Hawkins*, 11 Ind. 316; *Moseley v. Shattuck*, 43 Iowa, 540; *Drury v. Hervey*, 126 Mass. 519; *Chase v. Pike*, 125 Mass. 117; *Benner v. Puffer*, 114 Mass. 376; *Whitwell v. Vincent*, 21 Mass. (4 Pick.) 449; s. c. 16 Am. Dec. 355; *Barrett v. Pritchard*, 19 Mass. (2 Pick.) 512; s. c. 13 Am. Dec. 449; *Preston v. Whitney*, 23 Mich. 280; *Ridgeway v. Kennedy*, 52 Mo. 24; *Dannefelter v. Weigal*, 27 Mo. 45; *Holt v. Holt*, 58 N. H. 276; *King v. Bates*, 57 N. H. 446; *Powell v. Preston*, 3 T. & C. (N. Y.) 644; *Boon v. Moss*, 70 N. Y. 465; *Morris v. Rexford*, 18 N. Y. 552; *Cole v. Mann*, 3 T. & C. (N. Y.) 380; *Strong v. Taylor*, 2 Hilt. (N. Y.) 326; *Wright v. Pierce*, 4 Hun (N. Y.) 351; *Sanders v. Keber*, 28 Ohio St. 630; *Sage v. Sleutz*, 23 Ohio St. 1; *Bauendahl v. Horr*, 7 Blatchf. C. C. 548; *Rogers Locomotive Works v. Lewis*, 4 Dill. C. C. 158; *Re Binford*, 3 Hughes C. C. 265; *Truman v. Hardin*, 5 Sawy. C. C. 115; *Fosdick v. Car Co.*, 99 U. S. (9 Otto) 256; bk. 25, L. ed. 344; *Bateman v. Green*, Ir. R. 2 C. L. 166; *Nordheimer v. Robinson*, 2 Ont. App. 305; *Mason v. Bickle*, 2 Ont. App. 291; *Walker v. Hyman*, 1 Ont. App. 345; *Tufts v. Mottashed*, 29 Up. Can. C. P. 539; *Black v. Drouillard*, 28 Up. Can. C. P. 107; *Stevenson v. Rice*, 24 Up. Can. C. P. 245; *Weeks v. Lalor*, 8 Up. Can. C. P. 239.

A bailee of personal property on a conditional sale cannot convey the title or subject it to execution for his own debts until the condition of the sale has been performed. *Harkness v. Russell*, 118 U. S. 664; bk. 30, L. ed. 285. And an express company carrying goods on order of seller to deliver to purchaser C. O. D. is agent of seller, and title does not pass till after performance of conditions precedent, delivery and payment. *State*

v. O'Neil, 58 Vt. 140; s. c. 1 New Eng. Rep. 775.

Title not to pass until payment.—A sale and delivery of personal property, the title to remain in the vendor until payment of the purchase price, is a conditional sale and is valid, and the title remains in the vendor. *McRae v. Merrifield*, 48 Ark. 160; s. c. 2 S. W. Rep. 780; *McIntosh v. Hill*, 47 Ark. 363; *Cooley v. Gillan*, 54 Conn. 80; s. c. 2 New Eng. Rep. 826; *Bowen v. Frick*, 75 Ga. 786; *Roberts v. Savannah, F. & W. Ry.*, 75 Ga. 225; *Coover v. Johnson*, 86 Mo. 533; s. c. 1 West. Rep. 770; *Defiance Machine Works v. Trisler*, 21 Mo. App. 69; s. c. 3 West. Rep. 180; *Silver Bow & Co. v. Lowry*, 6 Mont. Ter. 288; *Heinbockle v. Zugbaum*, 5 Mont. Ter. 345; s. c. 51 Am. Rep. 59; *Marvin Safe Co. v. Norton*, 48 N. J. L. (19 Vr.) 410; s. c. 5 Cent. Rep. 341; *Harris v. Woodward*, 96 N. C. 232, although the description of the chattel in the instrument containing the agreement for the conditional sale is wrong. *Harris v. Woodward*, 96 N. C. 232.

But where an absolute bill of sale of personal property was given, under which the appellee took possession of the property, — the property being subject to a mortgage which the purchaser assumed, agreeing to credit the seller with the entire proceeds upon sale of the property, less the amount of the mortgage, — it was held the intention of the parties that the property should then pass. *Foster v. Magill*, 119 Ill. 75; s. c. 6 West. Rep. 765.

Construction of a chattel with the reservation of title to the vendor until the purchase price is paid, is a conditional and not an absolute sale, and no title vests in the purchaser until the payment; and a provision in the contract that the purchaser shall execute a mortgage on the property to secure the payment does not make the sale absolute unless the mortgage be in fact executed. *McRae v. Mer-*

rifield, 48 Ark. 160; s. c. 2 S. W. Rep. 780.

Conditional sale.—*Validity as to third parties.*—*Sub-vendees.*—In the absence of fraud a conditional sale is valid against third persons, as well as against the parties. *McIntosh v. Hill*, 47 Ark. 363; *Coover v. Johnson*, 86 Mo. 533; s. c. 1 West. Rep. 770; *Silver Bow & Co. v. Lowry*, 6 Mont. Ter. 288; *Heinbockle v. Zugbaum*, 5 Mont. Ter. 345; s. c. 51 Am. Rep. 59; *Harris v. Woodward*, 96 N. C. 232; *Harkness v. Russell*, 118 U. S. 663; bk. 80, L. ed. 285. See *Ridgeway Stove Co. v. Way*, 141 Mass. 557; s. c. 2 New Eng. Rep. 363. The fact that the property is misdescribed in the bill of sale will not affect the rights of the vendor. *Harris v. Woodward*, 96 N. C. 232. But where a portable heating furnace with pipes and registers attached, are annexed to a dwelling-house, they pass to *bond fide* purchaser without notice of an agreement between the owner and plaintiff that they should remain in the latter's property until paid for. *Ridgeway Stove Co. v. Way*, 141 Mass. 557; s. c. 2 New Eng. Rep. 363.

In Minnesota, Gen. St. 1878, c. 39, providing for filing of contracts of conditional sales, is not operative to avoid such a contract as to creditors having notice thereof. *Dyer v. Thorstad*, 35 Minn. 534.

In Missouri.—The word "creditor" as used in 2505 and 2507 of Revised Statute concurring conditional sales, means subsequent creditors. *Defiance Machine Wks. v. Trisler*, 21 Mo. App. 69; s. c. 3 West. Rep. 180.

A consignment of goods by one merchant to another, to be sold on commission, is not a sale, lease, hiring, or delivery of goods, on condition that the title should pass to the vendee or lessee or to other person on payment of the price or value of the property when sold, within the provisions of Rev. Stat. 1879, § 2507, providing that such con-

ditions shall be void as to subsequent purchasers in good faith, and creditors, unless the same is recorded, as in case of chattel mortgages. *Veet v. Spencer*, 90 Mo. 384; s. c. 7 West. Rep. 286.

In New Jersey.—S. purchased of the Marvin Safe Company a safe on credit, under a contract that the safe was to be the property of the company until the contract price was paid. The purchase was made at the company's office in Philadelphia, and the safe was delivered there to carrier to be transferred to the State where S. resided. Subsequently S. sold the safe to N. and delivered possession to him. The safe was then at Hightstown, and the sale and delivery to N. were made at that place. N. was a *bonâ fide* purchaser, and paid his purchase money without knowledge of the contract between S. and the company. In trover by the company against N. for the safe,—Held “(1) that the contract of the purchase by N. having been made in this State; the legal effect of his contract of purchase and his rights under it were determined by the law of this State; (2) that N. by his purchase acquired only such title as his vendor had when the property was brought into this State and became subject to the laws of this State, and that therefor the title in the safe was in the company.” *Marvin Safe Co. v. Norton*, 48 N. J. L. (19 Vr.) 410; s. c. 5 Cent. Rep. 341.

In New York.—The condition is void unless the contract be filled as required by chapter 315 of 1884. On August 5, 1885, the plaintiff sold a wagon to one Smith for seventy-two dollars and fifty cents, five dollars being paid in cash and a note for the balance being given by Smith to the plaintiff until the note was paid, and that the plaintiff might take possession of the wagon whenever he felt insecure. Smith took possession of the wagon and eight weeks thereafter sold it to the defendant, who took

the same without notice of the plaintiff's claim, paying therefor ten dollars in cash and applying fifty-five dollars on an old debt owing to him by Smith. The plaintiff, after tendering to the defendant ten dollars and demanding the wagon, brought this action to recover its value in a justice's court. Held, that as the contract was not filed as required by chapter 315 of 1884, the conditions and reservations contained in the note, qualifying and limiting Smith's ownership were, as against the defendant who purchased in good faith and without notice of the same absolutely void. *Moyer v. McIntyre*, 43 Hun (N. Y.) 58.

In North Carolina.—As between the parties, a conditional sale is binding although not reduced to writing or registered. The Code, 1275, only requires registration, as against creditors and purchasers for value. *Butts v. Screws*, 95 N. C. 215.

In Vermont.—By the law of this State, upon a conditional sale of chattels followed by delivery of possession to the vendee, the reservation of title in the vendor until the contract price is paid is valid, as against creditors of and *bonâ fide* purchasers from the vendee, unless the vendor has conferred upon the vendee indicia of title beyond mere possession, or has forfeited his rights by conduct which the law regards as fraudulent. *Dixon v. Blondin*, 58 Vt. 689; s. c. 2 New Eng. Rep. 777; *Marvin Safe Co. v. Norton*, 48 N. J. L. (19 Vr.) 410; s. c. 5 Cent. Rep. 341.

A conditional sale, not evidenced by a writing, is valid in Vermont. *Dixon v. Blondin*, 58 Vt. 689; s. c. 2 New Eng. Rep. 777.

Where goods to be sold at retail.—Where goods are sold upon credit and delivered to a retail dealer, for the apparent and implied purpose of re-sale a condition that the title should remain in the vendor until the purchase price is paid, is fraudulent and void as against a *bonâ fide* pur-

chaser from the vendee. *Winchester Wagon Works and Manuf. Co. v. Carman*, 109 Ind. 81; s. c. 58 Am. Rep. 382. And where goods are delivered to a customer to be sold at retail on an agreement that they are to be paid for on a specified day in the future, if sold at that time and that what remains unsold should be taken back, the contract is not a bailment but a sale with an option on the part of the purchaser to return the goods remaining unsold at the specified time. *Robinson v. Fairbanks*, 81 Ala. 132.

Vendor's right. — Replevin. — Upon failure to pay for the property as agreed, the vendor may recover it in an action of replevin or may treat the sale as valid and sue for the agreed price. *McRae v. Merrifield*, 48 Ark. 160; s. c. 2 S. W. Rep. 780; *Campbell Printing Press Co. v. Walker*, 48 Hun (N. Y.) 449. And where goods have been exchanged for the price of the goods purchased, the vendor may maintain replevin without returning the goods, unless a return of them, upon the failure of the sale, is provided for in the contract. *McRae v. Merrifield*, 48 Ark. 160; s. c. 2 S. W. Rep. 780. See *Mansur v. Hill*, 22 Mo. App. 372; s. c. 4 West. Rep. 858.

Purchasers' rights after payment. — In a contract for the sale of books where the payment was to be made by instalments, and the title was not to pass until after full payment of the purchase price with option of the vendor to retake the property if any instalment was unpaid, and on any instalment becoming due and unpaid the remaining instalment to become payable immediately, the vendee cannot return the books in discharge of the contract, leaving the instalment unpaid. *Appleton v. Norwalk Library Corp.*, 53 Conn. 4; s. c. 3 New Eng. Rep. 644; See *Loomis v. Bragg*, 50 Conn. 228; s. c. 47 Am. Dec. 638; *Hine v. Roberts*, 48 Conn. 267; s. c. 40 Am. Dec. 17.

Payment and delivery simultaneous.

— A sale for cash is a conditional sale and vests no title in the purchaser until the payment of the purchase price. *Commonwealth v. Devlin*, 141 Mass. 423; s. c. 2 New Eng. Rep. 101; *Turner v. Moore*, 58 Vt. 455; s. c. 2 New Eng. Rep. 110. And where a contract is that delivery of notes in payment is to be concurrent with that of the article sold, the transaction is not a conditional sale but a mere agreement to sell. *Millhiser v. Erdman*, (N. C. Oct. 24, 1887,) 3 S. E. Rep. 521. See *Piereson v. Spaulding* (Mich.), 12 West. Rep. 493.

Payment made in notes. — A contract for the purchase of a machine on credit, providing that until the notes, given for the purchase price, shall be paid, the machine shall remain vendor's property, and may meanwhile be used by the purchaser and be in his possession, and if the notes are not paid, vendor may resume possession, is a conditional credit with a provision to convert the sale on credit into a bailment if the price should not be paid. Such provision does not convert the contract into a bailment *ab initio*. *Wire B. S. Machine Co. v. Crowell* (Pa.), 6 Cent. Rep. 186; 8 Atl. Rep. 22. See *Trick v. Hilliard*, 95 N. C. 117.

A note and agreement executed contemporaneously, and upon which possession of personal property is acquired, must be considered together as parts of the same transaction; and where such instruments show that the title to such property is to remain in the party to whom the notes are payable, one who subsequently acquires possession of the property by purchase from the maker of the notes, and, when sued for the amount remaining due as purchase money, attempts to show that the payee is estopped by his conduct or laches from asserting his title in the property, must prove that

The authorities in support of these propositions will now be considered.²

such payee represented to or concealed from such purchaser some material fact, or that the purchaser was induced to act in the premises by something said or done by the payee. *Baals v. Stewart*, 109 Ind. 371; s. c. 7 West. Rep. 61.

Requiring security for the price to be paid for a chattel does not of itself make the sale absolute. *McRae v. Merrifield*, 48 Ark. 160; s. c. 2 S. W. Rep. 780.

Whether delivery absolute or conditional is for the jury.—The question whether a sale of personal property is complete or only executory is to be determined from the intention of the parties gathered from the contract, the situation of the thing sold, and the circumstances surrounding the sale. *Gurney v. Collins* (Mich.), 7 West. Rep. 670; 31 N. W. Rep. 429; *Moran v. King*, 28 W. Va. 1.

² Judge Story has tersely stated the substance of those rules when he says that if "there remains anything to be done to designate the particular property or to complete the rights of the vendee, then the property does not pass until such acts are done." *Barrett v. Goddard*, 3 Mason C. C. 107, 111. The principle which runs through all the cases is the same. See *Barnard v. Poor*, 38 Mass. (21 Pick.) 378; *Prescott v. Locke*, 59 N. H. 94; s. c. 12 Am. Rep. 55; *Fuller v. Bean*, 34 N. H. 300; *Warren v. Buckminster*, 24 N. H. 342; *Davis v. Hill*, 3 N. H. 382; s. c. 14 Am. Dec. 373; *Russell v. Carrington*, 42 N. Y. 118; s. c. 1 Am. Rep. 498; *Rapelye v. Mackie*, 6 Cow. (N. Y.) 253; *Hanson v. Meyer*, 6 East, 614; 2 Kent's Com. 496; *Browne on Statute of Frauds*, § 17. See, also, *McDonald v. Hewett*, 15 Johns. (N. Y.) 349; s. c. 8 Am. Dec. 211; *Merritt v. Johnson*, 7 Johns. (N. Y.) 473; s. c. 5 Am. Dec. 289; *Shepley*

v. Davis, 5 Taunt. 617; *White v. Wilks*, 5 Taunt. 176; *Mucklow v. Mangles*, 1 Taunt. 318; *Owenson v. Morse*, 7 Tr. 65.

Sale of grain in elevator.—However, it was held by the New York Court of Appeals in the case of *Russell v. Carrington*, 42 N. Y. 118; s. c. 1 Am. Rep. 498, that a sale of a specified quantity of grain, part of a cargo in elevator, the delivery by vendors to the vendees upon payment of the agreed price of a receipted bill of sale and subsequently of an order of the grain purchased drawn upon the elevator by the person upon whose account the cargo was stored, and who was superintendent of the elevator, sufficiently manifests an intention to pass the title, and renders the transaction an executed contract without actual separation and delivery of the property. See, also, *Hurff v. Hires*, 40 N. J. L. (11 Vr.) 581, 593; s. c. 29 Am. Rep. 282; *Lobdell v. Stowell*, 51 N. Y. 75; *Pleassants v. Pendleton*, 6 Rand. (Va.) 473; s. c. 18 Am. Dec. 728. This decision is founded upon the principle that upon a sale of a specified quantity of grain its separation from the mass, undistinguishable quality or value in which it is included it is not necessary to pass the title, that it should be separated from the bulk when the intention to do so is otherwise clearly manifested. *Kimberly v. Patchin*, 19 N. Y. 330. This case is denied in *Ferguson v. Northern Bank of Ky.*, 14 Bush (Ky.) 555; s. c. 29 Am. Rep. 418; disapproved in *Commercial Nat. Bank v. Gillette*, 90 Ind. 268; s. c. 46 Am. Rep. 222. See *McLaughlin v. Piatti*, 27 Cal. 463; *Morrison v. Woodley*, 84 Ill. 192; *Bertelson v. Bower*, 81 Ind. 512; *Indianapolis & C. R. W. Co. v. Maguire*, 62 Ind. 140; *Lester v. East*, 49 Ind. 588; *Scott v. King*, 12 Ind.

§ 361. In *Hanson v. Meyer*,¹ the defendant sold a parcel of starch at 6l. per cwt., and directed the warehouseman to weigh and deliver it. Part was weighed and delivered, and then the purchaser became bankrupt, whereupon the vendor countermanded the order for delivery of the remainder, and took it away. In an action for trover, brought by the assignees of the bankrupt purchaser, Lord Ellenborough said, that the act of weighing was in the nature of a condition precedent to the passing of the property by the terms of the contract, because "the price is made to depend upon the weight."

§ 362. In *Rugg v. Minett*,¹ a quantity of turpentine, in casks, was put up at auction, in twenty-seven lots. By the terms of the sale, twenty-five lots were to be filled up by the vendors, out of the turpentine in the other two lots, so that the twenty-five lots would each contain a certain specified quantity, and the last two lots were then to be measured and paid for. The plaintiff bought the last two lots, and twenty-two of the others. The three lots sold to other parties had been filled up, and taken away, and nearly all of those bought by plaintiff had been filled up, but a few remained unfilled, and the last two lots had not been measured, when a fire occurred and consumed the goods. The buyer sued to recover back a sum of money paid by him on account of his purchase. The Court held, that the property

208; *Moffatt v. Green*, 9 Ind. 198; *Bricker v. Hughes*, 4 Ind. 146; *Murphy v. State*, 1 Ind. 366; *Courtright v. Leonard*, 11 Iowa, 32; *Ferguson v. Northern Bank of Ky.*, 14 Bush (Ky.) 555; s. c. 29 Am. Rep. 418; *Newcomb v. Cabell*, 10 Bush (Ky.) 460; *May v. Hoaglan*, 9 Bush (Ky.) 171; *Moss v. Meshew*, 8 Bush (Ky.) 187; *Crawford v. Smith*, 7 Dana (Ky.) 59; *Jennings v. Flanagan*, 5 Dana (Ky.) 217; *Ropes v. Lane*, 91 Mass. (9 Allen) 502; *Scudder v. Worster*, 65 Mass. (11 Cush.) 573; *Merchants, &c. Manuf. Bank of D. v. Hibard*, 48 Mich. 118; s. c. 42 Am.

Rep. 465; *Anderson v. Brenneman*, 44 Mich. 198; *Ockington v. Richey*, 41 N. H. 275; *Fuller v. Bean*, 34 N. H. 290; *Woods v. McGee*, 7 Ohio, 137; s. c. 30 Am. Dec. 202; *Hubler v. Gaston*, 9 Oreg. 66; s. c. 42 Am. Rep. 794; *Haldeman v. Duncan*, 51 Pa. St. 66; *Hutchinson v. Hunter*, 7 Pa. St. 140; 2 Kent Com. 639; *Story on Sales*, sec. 296.

¹ 6 East, 614. See *Hoffman v. Culver*, 9 Ill. App. 450; *United States v. Woodruff*, (*Elgee Cotton Cases*), 69 U. S. (22 Wall.) 180, 189; bk. 22, L. ed. 863.

¹ 11 East, 210.

had passed in those lots only which had been filled up, because, as Lord Ellenborough said: "Everything [*270] had been done by *the sellers which lay upon them to perform in order to put the goods in a deliverable state." And Bayley J. said, that it was incumbent on the buyer "to make out that something remained to be done to the goods by the sellers at the time when the loss happened."²

§ 363. In *Zagury v. Furnell*,¹ the property was held not to have passed, in a sale of "289 bales of goat skins, from Mogadore, per Commerce, containing five dozen in each bale, at the rate of 57s. 6d. per doz.," because, by the usage of trade, it was the seller's duty to count the bales over, to see whether each bale contained the number specified in the contract, and this had not been done when the goods were destroyed by fire. This was a decision of Lord Ellenborough, at Nisi Prius, and the reporter states that after the plaintiff's nonsuit, he brought another action in the Common Pleas, and was again non-suited by Sir James Mansfield C. J., who concurred in opinion with Lord Ellenborough.

In *Simmons v. Swift*,² the sale was of a specified stack of bark, at 9l. 5s. per ton, and a part was weighed and taken away, and paid for. Bayley J., and the majority of the Court, held, that the property had not passed in the unweighed residue, although the specific thing was ascertained, because it was to be weighed, "and the concurrence of the seller in the act of weighing was necessary."³

² See, also, *Acraman v. Morrice*, 8 C. B. 449. The case of *Regg v. Minett*, 11 East, 210, is followed in Mass. where the court say that in the sale of personal property, the general rule of law is that by the terms of the contract the seller agrees to it; anything for the purpose of putting the property in a state in which the buyer is bound to accept it, or into a condition to be delivered, that the title will remain in the vendor until he has performed the agreement in this respect.

See, also, *Morse v. Sherman*, 106 Mass. 430. And the principle of the case cited in the text is applied to the sale of unmeasured wood in *McNeil v. Kelcher*, 15 Up. Can. C. P. 470.

¹ 2 Camp. 240.

² 5 B. & C. 857.

³ *Young v. Austin*, 23 Mass. (6 Pick.) 280; *Waldo v. Belcher*, 11 Ired. (N. C.) 609; *Messer v. Woodman*, 22 N. H. 172; *Stevens v. Eno*, 10 Barb. (N. Y.) 95; *Dixon v. Myers*, 7 Gratt. (Va.) 240.

§ 364. In *Logan v. Le Mesurier*,¹ the sale was on the 3d of December, 1834, of a quantity of red pine timber, then lying above the rapids, Ottawa River stated to consist of 1391 pieces, measuring 50,000 feet, more or less, to be delivered at a certain boom in Quebec, on or before the 15th of June then next, and to be paid for by the purchasers' notes at ninety days from the date of sale, at the rate of $9\frac{1}{2}d.$ per foot, measured off. If the quantity turned out more than 50,000 feet, the purchasers were to pay for the surplus, on * delivery, at $9\frac{1}{2}d.$, and if it fell short, the [*271] difference was to be refunded by the sellers. The purchasers paid for 50,000 feet, before delivery, according to the contract. The timber did not arrive in Quebec till after the day prescribed in the contract, and when it did arrive, the raft was broken up by a storm, and a great part of the timber lost, before it was measured and delivered. Held, that the property was not transferred until measured,² and

¹ 6 Moo. P. C. 116. See, also, *Wallace v. Breeds*, 13 East, 522; *Busk v. Davis*, 2 M. & S. 397; *Austen v. Craven*, 4 Taunt. 644; *Shepley v. Davis*, 5 Taunt. 617; *Withers v. Lyss*, 4 Camp. 237; *Boswell v. Kilborn*, 15 Moo. P. C. 309.

² See *Stone v. Peacock*, 35 Me. 388; *Macomber v. Parker*, 30 Mass. (18 Pick.) 183; *Prescott v. Locke*, 51 N. H. 94; s. c. 12 Am. Rep. 55; *Ockington v. Richey*, 41 N. H. 275; *Russell v. Carrington*, 42 N. Y. 118; s. c. 1 Am. Rep. 498.

In a case where A. sold B. part of a growing crop of corn, designating the part sold by cutting off the tops of one row, and B. paid \$80 cash in part payment, but by the terms of the sale A. was to cut and shuck a part of the corn, and to gather the remainder, and the corn was then to be measured and paid for by the bushel. The corn having been subsequently levied on in an execution against A., it was held that whether the title passed or not was a question of intention of the parties and for the jury. *Graff*

v. Fitch, 58 Ill. 373; s. c. 11 Am. Rep. 85. It seems to be well settled that in a contract for the 'sale of specified goods or all goods identified, if such is the intention of the parties, the title will pass to the purchaser without delivery, although something yet remains to be done by the seller to put the property in condition for final delivery. *Marble v. Moore*, 102 Mass. 443; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 295; *Beecher v. Mayall*, 82 Mass. (16 Gray) 376; *Bemis v. Morrill*, 38 Vt. 153; *Young v. Matthews*, L. R. 2 C. P. 127; *Martineau v. Kitching*, L. R. 7 Q. B. 449; *Falk v. Fletcher*, 18 C. B. N. S. 403; s. c. 11 Jur. N. S. 176. Thus where something remains to be done for the purpose of testing the property, or of fixing the amount to be paid, by weighing, measuring, or the like, the property is held by some courts to pass before the act is done, where such appears by the contract to have been the intention of the parties. *Burr v. Williams*, 23 Ark. 244; *Ford v. Chambers*, 28 Cal. 13; *Cummins v.*

that the purchasers could recover back the price paid for all timber not received, and damages for breach of contract.³

§ 365. In *Gilmour v. Supple*,¹ where the facts were identical with the preceding, as regards the sale of a raft of timber, which was broken up by a storm, the words of the contract were, "Sold Allen, Gilmour, and Co. a raft of timber, now at Carouge, containing white and red pine, the quantity about 71,000 feet, to be delivered at Indian Cove booms. Price for the whole 7½ per foot." The raft *was delivered* to the buyers' servant, at the appointed place, and broken up by a storm the same night. The Court held, in this case, that the property had passed, because it was proven that the raft *had been measured before delivery*, by a public officer, and it was not to be *measured again by the vendor*. The buyer was at liberty to measure it for his own satisfaction, as in *Swanwick v. Sothern*,² but the vendor had lost all claim on the timber, and all lien for price, and there was nothing further for him to do either alone, or concurrently with the purchaser.³

Griggs, 2 Duv. (Ky.) 87; *Cushman v. Holyoke*, 34 Me. 289; *Denny v. Williams*, 87 Mass. (5 Allen) 3; *Riddle v. Varnum*, 37 Mass. (20 Pick.) 283; *Russell v. Carrington*, 42 N. Y. 118; s. c. 1 Am. Rep. 498; *Terry v. Wheeler*, 25 N. Y. 525; *Filkins v. Whyland*, 24 N. Y. 338; *Williams v. Adams*, 3 Sneed (Tenn.) 359; *Fitch v. Burk*, 38 Vt. 683; *Jenner v. Smith*, L. R. 4 C. P. 270; *Castle v. Playford*, L. R. 7 Ex. 98; *Alexander v. Gardner*, 1 Bing. (N. C.) 671; *Turley v. Bates*, 2 Hurl. & C. 200. The passing of title always depends upon the intention of the parties. *Stone v. Peacock*, 35 Me. 388; *Morse v. Sherman*, 106 Mass. 430; *Fuller v. Bean*, 34 N. H. 300; *Bellows v. Wells*, 36 Vt. 599; *Young v. Matthews*, L. R. 2 C. P. 127. And the question of intent is for the jury. *McClung v. Kelley*, 21 Iowa, 508; *George v. Stubbs*, 26 Me. 250; *Riddle v. Varnum*, 37 Mass. (20 Pick.) 283; *De*

Ridder v. McKnight, 13 Johns. (N. Y.) 294.

³ The doctrine of this case is applied in *Hutchinson v. Hunter*, 7 Pa. St. 146.

¹ 11 Moo. P. C. 551. The same doctrine is held in Canada. See 5 Up. Can. C. P. 318.

² 9 A. & E. 895.

³ *Floating timber*. — There are many cases of sales of logs and floating timber in the American reports. See *Bethel Steam Mill Co. v. Brown*, 57 Me. 9; *Cushman v. Holyoke*, 34 Me. 289; *Riddle v. Varnum*, 37 Mass. (20 Pick.) 280; *Colwell v. Keystone Iron Co.*, 36 Mich. 51; *Wilkinson v. Holiday*, 33 Mich. 388; *Adams Mining Co. v. Senter*, 26 Mich. 73; *Martin v. Hulbut*, 9 Minn. 142; *Prescott v. Locke*, 51 N. H. 94; s. c. 12 Am. Rep. 55; *Scott v. Wells*, 6 Watts & S. (Pa.) 357; s. c. 40 Am. Dec. 568; *Gibbs v. Benjamin*, 45 Vt. 124; *Pike v. Vaughan*, 39 Wis. 499; *Leonard v.*

§ 366. In *Acraman v. Morris*,¹ the defendant had contracted for the purchase of the trunks of certain oak trees from one Swift. The course of trade between the parties was, that after the trees were felled, the purchaser measured and marked the portions that he wanted. Swift was then to cut off the rejected parts, and deliver the trunks at his own expense, conveying them from Monmouth to Chepstow. The timber in controversy had been bought, measured, and paid for, but the rejected portions had not yet been severed * by Swift, when he became bankrupt, and [*272] the felled trees then lay on his premises. Defendant afterwards had the rejected portions severed by his own men, and carried away the trunks for which he had paid. Action in trover, by the assignees of the bankrupt. Held, that the property had not passed to the buyer, *Wilde C. J.* saying that "several things remained to be done by the seller . . . it was his duty to sever the selected parts from the rest, and convey them to Chepstow, and deliver them at the purchaser's wharf."²

§ 367. But in *Tansley v. Turner*,¹ the sale by the plaintiff was as follows:—"1833. Dec. 26. Bargained and sold Mr. George Jenkins all the ash on the land belonging to John Buckley, Esq., at the price per foot cube, say 1s. 7½d. Payment on or before 29 Sept., 1834. The above Geo. Jenkins to have power to convert on the land. The timber is now felled;" and some trees were measured and taken away the same day. The remaining trees were marked and measured some time afterwards, and the number of cubic feet in the several trees was taken, and the figures put down on paper by the plaintiff's servant, but the whole was not then added up, and the plaintiff said he would make out the statement

Davis, 66 U. S. (1 Black) 476; bk. 17, L. ed. 222; *Cooper v. Bill*, 5 Hurl. & C. 722.

¹ 8 C. B. 449.

² *Bethel Steam Co. v. Brown*, 57 Me. 9; *Prescott v. Locke*, 51 N. H. 94; s. c. 12 Am. Rep. 55; *Kelsea v. Haines*, 41 N. H. 246, 255; *Boynton v. Veazie*, 24 Me. 286; *Bradley v.*

Wheeler, 44 N. Y. 495; *Terry v. Wheeler*, 25 N. Y. 520; *Brewer v. Salisbury*, 9 Barb. (N. Y.) 511; *Olyphant v. Baker*, 5 Den. (N. Y.) 379; *Birge v. Edgerton*, 28 Vt. 291; *Hutchins v. Gilchrist*, 23 Vt. 82; *Hale v. Huntley*, 21 Vt. 147; *McConnell v. Hughes*, 29 Wis. 537.

¹ 2 Scott, 238; 2 Bing. N. C. 151.

and send it to Jenkins. This was not done, but it was held that the property had passed, nothing remaining to be done by the vendor² to the thing sold.³

Cooper v. Bill⁴ was very similar to the above case in the facts, and was decided in the same way, Tansley v. Turner, however, not being cited by the counsel or the Court.⁵

§ 368. In Castle v. Playford,¹ the contract was for the sale of a cargo of ice to be shipped, "the vendors forwarding bills of lading to the purchaser, and upon receipt thereof the said purchaser *takes upon himself all risks and dangers of the seas, rivers, and navigation of whatever nature or kind soever*, and the said Playford to *buy and receive the said ice on its arrival at ordered port . . . and to pay for the same in cash on delivery at 20s. per ton, weighed on board* [*273] *during delivery.*" *Declaration for the price by the vendor, and plea that the cargo did not arrive at the ordered port, and the plaintiffs were not willing and ready to deliver. On demurrers to the declaration of the plea, Martin and Channell BB. were of opinion (Cleasby B. diss.) that the property did not pass by the terms of the contract, that the time for payment had not arrived, and that the defendant was not liable: but in the Exchequer Chamber the judgment was unanimous for the plaintiff, Cockburn C. J. and Blackburn J. expressing a very decided opinion that the property passed by the agreement, but the case was not decided on that point, but on the ground that whether the property passed or not, the defendant undertook to pay for it if delivery was prevented by dangers of the sea; and that in cases where property is to be paid for on delivery, and where the risk of delivery is assumed by the purchaser, if the destruction of the property prevents the delivery, the payment is still due, as decided in the cases below cited.²

² See *ante*, § 364, note 2. Also, Prescott v. Locke, 51 N. H. 94; s. c. 12 Am. Rep. 55; Fuller v. Bean, 34 N. H. 300, 301; Gibbs v. Benjamin, 45 Vt. 124, 128.

³ Mills v. Camp, 14 Conn. 219; s. c. 36 Am. Dec. 488; Cunningham v. Ashbrook, 20 Mo. 553; Hyde v.

Lathrop, 3 Keyes (N. Y.) 600; Birge v. Edgerton, 28 Vt. 291.

⁴ 34 L. J. Ex. 161; 3 H. & C. 722.

¹ L. R. 5 Ex. 165; 7 Ex. 98.

² Alexander v. Gardner, 1 Bing. N. C. 671; Fragano v. Long, 4 B. & C. 219.

It would seem that where spe-

§ 369. Similar questions were involved in *Martineau v. Kitching*,¹ where sugars were sold by the manufacturer to a broker. The terms were, "Prompt at one month: goods at seller's risk for two months." The goods had been marked, and paid for in advance of being weighed, at an approximate sum, which was to be afterwards definitely adjusted and settled when the goods came to be weighed on delivery; and part of them had been taken away by the purchaser. The residue was destroyed by fire after the lapse of the two months, and before being weighed. Held by Cockburn C. J. that the property had passed to the purchaser: and the other members of the Court seemed to agree with him, but the case was decided on the same ground as that of *Castle v. Playford*, *supra*.²

§ 370. [But in such cases the intention that the purchaser shall assume the risk before the property in the goods has vested in him must be either expressed in the written contract between the parties, as in *Castle v. Playford* and *Martineau v. Kitching*, or clearly to be inferred from the circumstances of *the case, the presumption being [*274] that the risk and the property go together.

§ 371. Thus, in *Anderson v. Morice*,¹ the plaintiff sought to recover the value of a cargo of rice which he had insured with the defendant, an underwriter at Lloyd's. The plaintiff had bought the rice under a contract, the material parts of which were as follows:—"Bought *the cargo* of Rangoon rice, per Sunbeam, at 9s. 1½d. per cwt., cost and freight. Payment by sellers' draft on purchaser at six months' sight,

cific goods are sold, to be paid for by the pound, bushel, or the like, on ascertaining the number of pounds or bushels which cannot be ascertained with precision because of the loss or destruction of the goods, in those cases where the risk was on the purchaser, the seller may recover the price by showing the amount as nearly as may be. *McConnell v. Hughes*, 29 Wis. 537; *Castle v. Playford*, L. R. 7 Ex. 98; *Martineau v.*

Kitching, L. R. 7 Q. B. 455, 456; *Alexander v. Gardner*, 1 Bing. N. C. 671; *Turley v. Bates*, 2 Hurl. & C. 200.

¹ L. R. 7 Q. B. 436.

² Followed by the Supreme Court of United States in the case of *United States v. Woodruff*, (*Elgee Cotton Cases*,) 89 U. S. (22 Wall.) 180, 193; bk. 22, L. ed. 863.

¹ 1 App. Cas. 713, in Ex. Ch. L. R. 10 C. P. 609; s. c. ib. 53.

with documents attached." The sellers advised the plaintiff to effect an insurance on the rice, per Sunbeam, and the plaintiff accordingly effected a policy of insurance with the defendant, which described the adventure as:—"Beginning upon the goods and merchandizes from the loading thereof aboard the ship, and to continue and endure during her abode at Rangoon." The Sunbeam arrived at Rangoon, and had taken on board 8878 bags of rice, the remaining 400 bags, which would have completed her cargo, being in lighters alongside, when she sank and was lost with the cargo on board of her. The captain afterwards signed bills of lading for the cargo shipped, which were endorsed to the plaintiff, and the sellers drew bills of exchange for the price of such cargo, which were accepted and met by the plaintiff. It was held in the Exchequer Chamber (diss. Quain J.), and afterwards affirmed by the House of Lords (the Lords being, however, equally divided), reversing an unanimous decision of the Common Pleas;—

1st, that by the terms of the contract of sale; the property in the rice did not vest in the plaintiff until a full cargo was shipped. The first rule laid down by Lord Blackburn, cited *ante*, p. 268, was referred to with approval, and it was held that the completion of the loading, so that shipping documents could be made out, was a thing to be done by the vendor for the purpose of putting the goods into a deliverable state.

2dly, that there was no sufficient intention manifested by the fact of insurance and the terms of the policy, [*275] that the *purchaser should assume the risk of loss before the property had vested in him, and that, therefore, he had no insurable interest in the goods at the time when they were lost.

Upon this 2d point the reader is referred to the observations of Blackburn J., L. R. 10 C. P. at p. 619.]

§ 372. A statement is made by the learned editors of Smith's Leading Cases, Vol. I., p. 164 (ed. 1879), that "it was held in a modern case in the Court of Exchequer (which seems not to have been reported) that the property

in a specified chattel bought in a shop to be paid for upon being sent home did not pass before delivery;"¹ and in accordance with this is the *dictum* of Cockburn C. J. in the *Calcutta Company v. De Mattos*,² that "if by the terms of the contract the seller engages to deliver the thing sold at a given place, and there be nothing to show that *the thing sold was to be in the meantime at the risk of the buyer*, the contract is not fulfilled by the seller unless he delivers it accordingly."

In both these instances, as in *Acraman v. Morris*,³ something remained to be done by the seller to the thing sold in order to make the agreement an executed contract.

In *Langton v. Higgins*,⁴ it was held that where the buyer had purchased in advance *all* the crop of peppermint oil to be raised and manufactured by a farmer, the property passed to the buyer in all the oil which had been put by the farmer into the buyer's bottles and weighed, although never delivered to him.

§ 373. But the property in goods will pass, even though something remain to be done by the vendor in relation to the goods sold, *after their delivery to the vendee*.¹ Thus,

¹ *Goods to be paid for on delivery at a certain place.*—Where goods are to be delivered at a certain place, to be paid for in cash on delivery, no title passes until after the delivery and payment. See *Boynton v. Veazie*, 24 Me. 286; *Suit v. Woodhall*, 113 Mass. 394; *Weld v. Came*, 98 Mass. 152; *Goddard v. Binney*, 115 Mass. 455; s. c. 15 Am. Rep. 112. Thus where, by a contract of sale, the vendor was to deliver lumber at a steamboat landing, and upon its delivery the vendee was to give two notes covering the amount of the balance of the purchase money, and the lumber was delivered and the notes given according to the contract, and accepted, it was held that the title of the lumber passed to the vendee on the giving of the notes, notwithstanding that a greater quantity

was delivered than had been bargained for. *DeGraff v. Byles* (Mich.), 5 West. Rep. 593.

² 32 L. J. Q. B. 322, 355.

³ 8 C. B. 449; 19 L. J. C. P. 57.

⁴ 28 L. J. Ex. 252; 4 H. & N. 402.

¹ See *Goddard v. Binney*, 115 Mass. 450; s. c. 15 Am. Rep. 112; *Odell v. Boston & Maine R. R.*, 109 Mass. 50, 52; *Scudder v. Bradbury*, 106 Mass. 422; *Mount Hope Iron Co. v. Buffinton*, 103 Mass. 62; *Richmond Iron Works v. Woodruff*, 74 Mass. (8 Gray) 447; *Kelsea v. Haines*, 41 N. H. 254, 255; *Pritchett v. Jones*, 4 Rawle (Pa.) 280, 286.

Actual delivery.—It has been held in Massachusetts that the rule, that the property does not pass, where anything remains to be done, applies to cases of constructive delivery and constructive possession, but not

where by the custom of the trade if the goods sold continued to lie at the wharf after the sale, the vendor was bound to pay for the warehousing during fourteen days: *held*, that this did not prevent the property from passing from the moment of the delivery.² And the same point was held in

Greaves v. Hepke,³ where by the usage at Liverpool [*276] the vendor was *bound to pay warehouse rent for

two months after the sale, and the goods were distrained during that interval for rent due by the warehouseman to his lessor. This risk, it was decided, must be borne by the purchaser.

The decision would no doubt be the same in other familiar cases, as if a vendor should engage to keep in good order for a certain time after the sale a watch or clock sold; or to do certain repairs to a ship after the sale and delivery.

§ 374. In *Turley v. Bates*,¹ (also reported *sub nom.* *Furley v. Bates*,)² the jury found that the bargain between the par-

ties to cases of an actual delivery. *Orcutt v. Nelson*, 67 Mass. (1 Gray) 543; *Sumner v. Hamlet*, 29 Mass. (12 Pick.) 82, 83; *Kelsea v. Haines*, 41 N. H. 254, 255. In *Macomber v. Parker*, 30 Mass. (13 Pick.) 175, 183, *Wilde* said: "Where the goods are actually delivered, that shows the intent of the parties to complete the sale by the delivery, and the weighing or measuring or counting afterwards would not be considered as any part of the contract of sale, but would be taken to refer to the adjustment of the final settlement as to the price. The sale would be as complete as a sale upon credit, before the actual payment of the price." *Wilkinson v. Holiday*, 33 Mich. 388; *Lingham v. Eggleston*, 27 Mich. 324.

² *Hammond v. Anderson*, 1 B. & P. N. R. 69.

³ 2 B. & Ald. 131.

¹ 2 H. & C. 200.

² 33 L. J. Ex. 43.

Where an act remains to be done by the seller or the purchaser, where it is not the intention of the parties that

the title should pass immediately, no title will pass until the performance of those conditions. See *Barnard v. Poor*, 38 Mass. (21 Pick.) 378; *Prescott v. Locke*, 51 N. H. 94; s. c. 12 Am. Rep. 55; *Fuller v. Bean*, 34 N. H. 290; *Warren v. Buckminster*, 24 N. H. 342; *Parker v. Mitchell*, 5 N. H. 165; *Davis v. Hill*, 3 N. H. 382; *Russell v. Carrington*, 42 N. Y. 118; s. c. 1 Am. Rep. 498; *Rapelye v. Mackie*, 6 Cow. (N. Y.) 253; *Ward v. Shaw*, 7 Wend. (N. Y.) 404; *Gibbs v. Benjamin*, 45 Vt. 124, 128; *Gorham v. Fisher*, 30 Vt. 428; *Hutchins v. Gilchrist*, 23 Vt. 83; *Hale v. Huntly*, 21 Vt. 147; *Barrett v. Goddard*, 3 Mason C. C. 111; *Hanson v. Meyer*, 6 East, 614; *Browne on Frauds*, sec. 317; 2 Kent Com. 496; *Chitt. on Contr.* 396. In some of the common law cases the language used is capable of being understood as importing that if an act remains to be done it must be by the seller, and necessary to designate and identify the goods to be sold, and not an act to be done by the buyer, or merely to ascertain the price to be

ties was for an entire heap of fire-clay, at 2s. per ton. The buyer was, at his own expense, to load and cart it away, and to have it weighed at a certain machine which his carts would pass on their way when carrying off the clay. All the authorities were reviewed by the Court, and it was held that the property had passed by the contract, great doubt being expressed whether the general rule could be made to extend to cases where something remains to be done to the goods, *not by the seller, but by the buyer*. Without determining this point, the conclusion was drawn that from the terms of the contract as established by the verdict of the jury, the intention of the parties was that the property should pass, and this was what the Court must look to, in every case.³

paid, in order to render the sale imperfect and to prevent the title from passing. See *Macomber v. Parker*, 30 Mass. (13 Pick.) 183; *Tarling v. Baxter*, 6 Barn. & C. 360; *Simmons v. Swift*, 5 Barn. & C. 857; *Wallace v. Breeds*, 13 East, 522; *Whitehouse v. Frost*, 12 East, 614; *Rugg v. Minett*, 11 East, 10; *Hanson v. Mayer*, 6 East, 614. But the court say in *Fuller v. Bean*, 34 N. H. 290, 301: "But we think there is no such limitation of the rule and that it is indifferent whether the act to be done to render the sale complete is to be done by the buyer or by the seller or by a third person; and that it is equally indifferent whether it is to be done to ascertain the amount to be sold, by their designation or measurement or their quality by the buyer or a public inspector; *Outwater v. Dodge*, 7 Cow. (N. Y.) 87; or merely to ascertain the price to be paid by the appraisal of a third person or by counting, weighing or the like, or to do any other act necessary to enable the property to pass in conformity to the agreement, such as might be the payment of duty on goods imported or their transportation to a different place."

³ *Logan v. Le Mesurier*, 6 Moo. P. C. 116; and *Hinde v. Whitehouse*,

7 East, 558; *Sedgwick v. Cottingham*, 54 Iowa, 512; *Burrows v. Whitaker*, 71 N. Y. 291; s. c. 27 Am. Rep. 42. Compare *O'Brien v. Jones*, 47 N. Y. Super. Ct. (15 J. & S.) 67, 73.

New York doctrine.—In the case of *Burrows v. Whitaker*, 71 N. Y. 291; s. c. 27 Am. Rep. 42, the New York Court of Appeals hold that where there has been a complete delivery of the property in accordance with the terms of the contract of sale, the title passes, notwithstanding the fact that something remains to be done in order to ascertain the total value at the rates agreed upon. See, also, *Graff v. Fitch*, 58 Ill. 373; s. c. 11 Am. Rep. 85, 89; *Crofoot v. Bennett*, 2 N. Y. 258; *Dexter v. Bevins*, 42 Barb. (N. Y.) 577; *Tyler v. Strang*, 21 Barb. (N. Y.) 206; *Brewer v. Salisbury*, 9 Barb. (N. Y.) 514; *Heroy v. Kerr*, 8 Bosw. (N. Y.) 206; *Olyphant v. Baker*, 5 Den. (N. Y.) 379; *Hyde v. Lathrop*, 3 Keyes (N. Y.) 597; *Keeler v. Vandervere*, 5 Lans. (N. Y.) 313; *Bradley v. Wheeler*, 4 Robt. (N. Y.) 27. Compare *Cooke v. Millard*, 65 N. Y. 365; s. c. 22 Am. Rep. 619; *Kein v. Tupper*, 33 N. Y. Super. Ct. (1 J. & S.) 476; *Chapin v. Potter*, 1 Hilt. (N. Y.) 372; see, also, *ante*, § 367, note 3. The distinctions in the cases do not de-

§ 375. In *Kershaw v. Odgen*,¹ the facts as found by the jury were that the defendants purchased four specific stacks of cotton waste, at 1s. 9d. per lb., the defendants to send their own packer and sacks and cart to remove it. The defendants sent their packer with eighty-one sacks, and he, aided by plaintiff's men, packed the four stacks into the eighty-one sacks. Two days after twenty-one of the sacks were weighed and taken to defendants' premises. The rest were not weighed. The same day the twenty-one sacks were returned by the defendants, who objected to the [*277] quality. * The cart loaded with the waste was left at the plaintiff's warehouse, and he put the waste into the warehouse to prevent its spoiling. *Held*, in an action on counts for not accepting, and for goods bargained and sold, and goods sold and delivered, that the plaintiff was entitled to recover, Pollock C. B. saying the case was not distinguishable in principle from *Furley v. Bates*, and Martin B. saying that on the finding "the property in the four stacks *became the property of the buyers*, and the plaintiff became entitled to the price in an action for *goods bargained and sold*." This *dictum* was not necessary to the decision, because there was a special count for non-accepting, under which the recovery could be supported, even if the contract was executory. The *dicta* of the two learned Barons in this case may, perhaps, be reconciled with the decision in *Simmons v. Swift*,² on the ground that the purchasers, by their return of the sacks weighed, and refusal to take any, had waived the condition that the remainder should be weighed by the vendor.

§ 376. In *Young v. Matthews*,¹ a purchaser of 1,300,000 bricks sent his agent to the vendor's brick-field to take de-

pend so much upon what is done, as upon the object to be effected. If the object be the specification, the property is not changed, but if it is merely to ascertain the total value at designated results, the change of title is effected. *Crofoot v. Bennett*, 2 N. Y. 258. See *Russell v. Carrington*, 42 N. Y. 118; s. c. 1 Am. Rep. 498; *Dexter v. Bevins*, 42 Barb.

(N. Y.) 573; *Tyler v. Strang*, 21 Barb. (N. Y.) 198; *Riddle v. Var-num*, 37 Mass. (20 Pick.) 282; *Macomber v. Parker*, 30 Mass. (13 Pick.) 175.

¹ 34 L. J. Ex. 159; and 3 H. & C. 717.

² 5 B. & C. 857, *ante*, p. 270.

¹ L. R. 2 C. P. 127.

livery, and the vendor's foreman said that the bricks were under distraint for rent, but if the man in possession were paid out, he would be ready to deliver the bricks; and he pointed out three clumps *from which* he should make the delivery, of which one was of finished bricks, the second of bricks still burning, and the third of bricks moulded, but not burnt. The buyer's agent then said: "Do I clearly understand that you are prepared and will hold and deliver this said quantity of bricks?" to which the answer was, "Yes." This was held a sufficient appropriation to pass the property, although the bricks were neither finished nor counted out; the Court, however, laying stress on some other circumstances to show that this was the intention of the parties. This case is only reconcilable with the authorities on the ground that as *matter of fact*, the proof showed an intention of the parties to take the case out of the general rule.²

² See *Waldron v. Chase*, 37 Me. 414; s. c. 59 Am. Dec. 56. In a contract for the sale of specific goods which have been identified or appropriated to the purchaser, the title will pass to such purchaser, when it was the intention of the parties, either expressed or implied from the circumstances, that it should so pass notwithstanding the fact that something remained to be done to put the property in a condition to be finally accepted by the purchaser. *Burr v. Williams*, 23 Ark. 244; *Ford v. Chambers*, 28 Cal. 13; *Watts v. Hendry*, 13 Fla. 523; *Straus v. Minzesheimer*, 78 Ill. 492; *Shelton v. Franklin*, 68 Ill. 333; *Graff v. Fitch*, 58 Ill. 373; s. c. 11 Am. Rep. 85; *Cummins v. Griggs*, 2 Duv. (Ky.) 87; *Marble v. Moore*, 102 Mass. 443; *Cushing v. Breed*, 96 Mass. (14 Allen) 376; *Denny v. Williams*, 87 Mass. (5 Allen) 3, 4; *Riddle v. Varnum*, 37 Mass. (20 Pick.) 283, 284; *Macomber v. Parker*, 30 Mass. (13 Pick.) 182, 183; *Warren v. Milliken*, 57 Me. 97; *Bethel Steam Mill Co. v. Brown*, 57 Me. 9; *Stone v. Peacock*, 35 Me. 388; *Cushman v. Holyoke*, 34 Me. 289; *Wilkinson v.*

Holiday, 33 Mich. 386; *Ockington v. Richey*, 41 N. H. 279; *Kelsea v. Haines*, 41 N. H. 246, 255; *Fuller v. Bean*, 34 N. H. 302; *Boswell v. Green*, 25 N. J. L. (1 Dutch.) 390, 398; *Groat v. Gile*, 51 N. Y. 431; *Russell v. Carrington*, 42 N. Y. 118; s. c. 1 Am. Rep. 498; *Terry v. Wheeler*, 25 N. Y. 520; *Filkins v. Whyland*, 24 N. Y. 341; *Hyde v. Lathrop*, 3 Keyes (N. Y.) 597; s. c. 3 Tr. App. (N. Y.) 320; *McCandlish v. Newman*, 22 Pa. St. 465; *Dennis v. Alexander*, 3 Pa. St. 50; *Butterworth v. McKinly*, 11 Humph. (Tenn.) 206; *Williams v. Adams*, 3 Sneed (Tenn.) 359; *Fitch v. Burk*, 38 Vt. 683, 689; *Bemis v. Morrill*, 38 Vt. 153; *Morrow v. Campbell*, 30 Wis. 90; *Morrow v. Reed*, 30 Wis. 81; *Sewell v. Eaton*, 6 Wis. 490; s. c. 70 Am. Dec. 471; *Woodruff v. United States*, 7 Ct. of Cl. 605; *The Bank of Montreal v. McWhirter*, 17 Up. Can. C. P. 506; *Farnum v. Perry*, 4 Law Rep. (Boston) 276. It is otherwise, however, where something remains to be done in order to complete the contract of sale, where it is to be done by the purchaser, by the vendor, or by a third person; *Darden v. Lovelace*, 52 Ala.

§ 377. Another class of cases illustrative of the [*278] rules now under * consideration, are those in which the subject of the contract is an unfinished or incomplete thing, a chattel not in a deliverable state, as a partly-built carriage or ship. Leaving out of view the cases¹ where no specific chattel has been appropriated (to be considered *post*, Ch. 5), it will be found that the Courts have held it necessary to show an express intention in the parties that the property should pass in a specific chattel unfinished at the time of the contract of sale, in order to take the case out of the general rule that governs where goods are not in a deliverable state.²

§ 378. In the case of *Woods v. Russell*,¹ decided in 1822, the ship-builder had contracted with defendant to build a

289; *Flanders v. Maynard*, 58 Ga. 56; *Foster v. Ropes*, 111 Mass. 10; *Prescott v. Locke*, 51 N. H. 94; s. c. 12 Am. Rep. 55; *Walrath v. Ingles*, 64 Barb. (N. Y.) 265; *Pike v. Vaughn*, 39 Wis. 499; and it is true even though the property is given into the possession and control of the purchaser; *Stone v. Peacock*, 35 Me. 385; *Ockington v. Richey*, 41 N. H. 275, 281; *Fuller v. Bean*, 34 N. H. 300; *Messer v. Woodman*, 22 N. H. 181, 182; *Parker v. Mitchell*, 5 N. H. 165; *Kein v. Tupper*, 52 N. Y. 550; *Field v. Moore, Hill & Den.* (N. Y.) 418, 421; *Ward v. Shaw*, 7 Wend. (N. Y.) 404.

¹ *Mucklow v. Mangles*, 1 Taunt. 218; *Bishop v. Crawshay*, 3 B. & C. 418; *Atkinson v. Bell*, 8 B. & C. 277.

² *Zaleski v. Clark*, 44 Conn. 218; s. c. 26 Am. Dec. 446; *Brown v. Foster*, 113 Mass. 136; s. c. 18 Am. Rep. 463; *Mount Hope Iron Co. v. Buffinton*, 103 Mass. 62; *Williams v. Jackman*, 82 Mass. (16 Gray) 517; *Blaisdell v. Souther*, 72 Mass. (6 Gray) 149, 152; *Middlesex Co. v. Osgood*, 70 Mass. (4 Gray) 447; *Phelps v. Willard*, 33 Mass. (16 Pick.) 29; *Bennett v. Platt*, 26 Mass. (9 Pick.) 558; *Mixer v. Howarth*, 38

Mass. (21 Pick.) 205; s. c. 32 Am. Dec. 256; *Thorndike v. Bath*, 114 Mass. 116; s. c. 19 Am. Rep. 318; *Pettengill v. Merrill*, 47 Me. 109; *Veazie v. Holmes*, 40 Me. 69; *Moody v. Brown*, 84 Me. 107; s. c. 56 Am. Dec. 640; *McIntyre v. Kline*, 30 Miss. 361; s. c. 64 Am. Dec. 163; *Elliott v. Edwards*, 35 N. J. L. (6 Vr.) 265; *West Jersey R. R. Co. v. Trenton Car Works*, 32 N. J. L. (3 Vr.) 517; *Higgins v. Murray*, 73 N. Y. 252; *McConihe v. New York & E. R. R.*, 20 N. Y. 495; s. c. 75 Am. Dec. 420; *Abbott v. Blossom*, 66 Barb. (N. Y.) 353; *Wright v. O'Brien*, 5 Daly (N. Y.) 54; *Gregory v. Stryker*, 2 Den. (N. Y.) 628; *Hubbard v. O'Brien*, 8 Hun (N. Y.) 244; *Merritt v. Johnson*, 7 Johns. (N. Y.) 473; s. c. 5 Am. Dec. 289; *Andrews v. Durant*, 11 N. Y. 35; s. c. 62 Am. Dec. 55; *Sutton v. Campbell*, 2 T. & C. (N. Y.) 595; *Johnson v. Hunt*, 11 Wend. (N. Y.) 135; *Gammage v. Alexander*, 14 Tex. 414; *Rider v. Kelley*, 32 Vt. 268; *Powers v. Barber* (N. Y.), 7 Alb. L. J. 170; *Gowans v. Consolidated Bank of Can.*, 43 Up. Can. Q. B. 318. See, also, *ante*, note on "Article to be manufactured."

¹ 5 B. & Ald. 942; *Sandford v.*

ship for him and to complete her in April, 1819; the defendant was to pay for her by four instalments, the first when the keel was laid, the second when at the light plank, and the third and fourth when the ship was launched; the ship was measured *with the builder's privity*, while yet unfinished, in order that defendant might get her registered in his name; the builder signed the certificate necessary for her registry, and the ship was registered in defendant's name on the 26th of June, and he paid the third instalment. On the 30th the builder committed an act of bankruptcy, and on the 2d of July the ship was taken possession of by the defendant before she was completed. The defendant had also in the previous March appointed a master, who superintended the building, had advertised her for charter in May, and on the 16th of June had chartered her, *with the ship-builder's privity*, for a voyage. An action in trover was brought by the assignees of the bankrupt, and it was held that the property had passed, "because the ship-builder signed the certificate to enable the defendant to have the ship registered in the defendant's name, and by that act consented, as it seems to us, that the general property in the ship should be considered *from that time* as being in the defendant." It is thus clearly intimated, that in the absence of some special evidence of intention, the property would have remained in the builder.

§ 379. *In *Clarke v. Spence*,¹ the defendants were [*279] the assignees of a bankrupt ship-builder named Brunton. In February, 1832, Brunton had agreed to build a ship (not the one in question in the action) for the plaintiff, according to certain specifications, under the superintendence of an agent appointed by plaintiff, for 3250*l.* payable as follows: 400*l.* when the ship was rammed, 400*l.* when 'timbered, 400*l.* when decked, 500*l.* when launched, the residue, 1500*l.* half at four and half at six months. In July he agreed to build another vessel, of specified dimensions, for 3400*l.*, to be finished like the previous ship, and "the vessel to be

Wiggins Ferry Co., 27 Ind. 522; *Anglo-Egyptian Navigation Co. v. Renie*, L. R. 10 C. P. 271, 282.

¹ 4 A. & E. 448. See also *Read v. Fairbanks*, 13 C. B. 692; 22 L. J. C. P. 206.

launched in the month of December next, and to be paid for in the same way" as the first vessel, "Mr. Howard (plaintiff's agent) to superintend the building and to be paid 40*l.* for the same." Brunton proceeded to build the vessel, and before his bankruptcy she was rammed and timbered, and two instalments paid accordingly. 200*l.* were also paid by anticipation on account of the third instalment. When Brunton became bankrupt, 1002*l.* 11*s.* had been paid him on account, and the frame of the vessel was then worth 1601*l.* 13*s.* 7*d.*, that being the value of the timber and work done on her. The case was elaborately argued in November, 1835, and held under advertisement till the ensuing February, when Williams J. delivered the judgment. Much stress had been laid, in argument, on a passage in the opinion delivered by Bayley J. in *Atkinson v. Bell*,² in which he said that "the foundation of the decision in *Woods v. Russell*³ was, that as by the contract, given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price, *the ship was irrevocably appropriated to the person paying the money*; that was a purchase of the specific articles of which the ship was made." In commenting upon this *dictum*, Williams J. showed that in *Woods v. Russell*³ the decision did [*280] not turn upon any such point, *although there were extra-judicial expressions strongly tending to that view, and he continued: "If it be intended in this passage that the specific appropriation of the parts of a vessel while in progress, however made, of itself vests the property in the person who gives the order, the proposition in so general a form may be doubtful. . . . Until the last of the necessary materials be added, the vessel is not complete; the thing contracted for is not in existence; for the contract is for a complete vessel, not for parts of a vessel, and we have not been able to find any authority for saying that while the thing contracted for is not in existence as a whole, and is incomplete, the general property in such parts of it as are from time to time constructed, shall vest in the purchaser, except the above passage in the case of *Woods v. Russell*."

² 8 B. & C. 277, 282.³ 5 B. & Ald. 942.

The Court, however, held, that the passage cited from *Woods v. Russell*, was "founded on the notion that provision for the payment regulated by particular stages of the work is made in the contract with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and *is equivalent to an express provision that on payment of the first instalment, the general property in so much of the vessel as it is then constructed shall vest in the purchaser.*" The Court, with the intimation of a wish that the intention of the parties had been expressed in less ambiguous terms, deliberately adopted this *dictum* from *Woods v. Russell*, as a *rule of construction* by which, in similar ship-building contracts, the parties are held to have by implication evinced *an intention that the property shall pass*, notwithstanding the general rule to the contrary. The law thus established has remained unshaken to the present time.⁴

§ 380. The next case was *Laidler v. Burlinson*,¹ in the Exchequer, in 1837, in which the Court recognized the authority of *Woods v. Russell*, and *Clarke v. Spence*, but held those cases not applicable to the contract before it. A ship-builder having a vessel in his yard about one-third *completed, a paper was drawn up describing her [*281] build and materials, ending with the words, "for the sum of 1750*l.*, and payment as follows, opposite to each respective name." This was signed by James Laing, the ship-builder. Then followed these words: "We, the undersigned, hereby engage to take shares in the before-mentioned vessel, as set opposite to our respective names, and also the mode of payment." This was signed by seven parties, four of whom set down the modes of payment opposite their names, but the other three did not, the plaintiff being one of the latter, and signing, simply, "Thomas Laidler, one-fourth." The whole number of shares was not made up till after the ship-builder had committed an act of bankruptcy. The plaintiff proved some payments made on account, and the ship-builder became a bankrupt while the vessel was still un-

⁴ See *per Mellish L. J.* in *Ex parte Lambton*, 10 Ch. 405, 414. ¹ 2 M. & W. 602.

finished. *Held*, that there was nothing in this contract to show an intention to vest the property before the ship was completed. Lord Abinger also said: "There is no occasion to qualify the doctrine laid down in *Woods v. Russell*, or *Clarke v. Spence*. I consider the principle which those cases establish to be, *that a man may purchase a ship as it is in progress of building*, and by the terms employed there, the contract was of that character; a superintendent was appointed, and money paid at particular stages. The Court held, that that was evidence of an intention to become the purchaser of the particular ship, and that the payment of the first instalment vested the property in the purchasers. Suppose the builder had died after the first instalment was paid, the ship in its then state would have become the property of the purchaser, and not of the executor. A party may agree to purchase a ship when finished, or as she stands." Parke B. said: "If a man bargain for a specific chattel, though it is not delivered, the property passes, and an action lies for the non-delivery, or of trover (*Langfort v. Tiler*, 1 Salk. 118). But it is equally clear that a chattel which is to be delivered *in futuro* does not pass *by the contract*. . . . Is this a contract for an article to be finished? In that case, the article must be finished before the property vests."

[*282] § 381. *In *Wood v. Bell*,¹ in 1856, the plaintiff contracted with Joyce, a ship-builder, for a steamer to be built by the latter for 16,000*l*. The contract was in March, 1854, and the price was payable, 4000*l*., in four equal parts, on days named in March, April, May, and June; 3000*l*. on the 10th August, 1854, "providing the vessel is plated and decks laid;" 3000*l*. on the 10th October, "providing the vessel is ready for trial;" 3000*l*. on the 10th January, 1855, "providing the vessel is according to contract, and properly completed;" and 3000*l*. on the 10th March, 1855, or by bill of exchange, dated 10th January. The building was begun in March, and continued till December, 1854, when Joyce became bankrupt. The ship was then on the slip in frame,

¹ 5 E. & B. 772, and 25 L. J. Q. B. 148, and s. c. in Ex. Ch. 6 E. & B. 355, and 25 L. J. Q. B. 321.

not decked, and about two-thirds plated. The instalments contracted for were paid by the plaintiff, in advance. The plaintiff had a superintendent, who supervised the building, objected to materials, and ordered alterations, which were submitted to by Joyce. In July, the plaintiff ordered his name to be punched on the keel, in order to secure the vessel to himself, and this object was known to Joyce, and he consented that this should be done, but it was delayed, because the keel was not sufficiently advanced, till October, and then the plaintiff's name was, at his own instance, punched on a plate riveted to the keel of the ship. It also appeared that in November the plaintiff urged Joyce to execute an assignment of the ship, but the latter objected on the ground "that he would be thereby signing himself and his creditors out of everything he possessed; but during the discussion he admitted that the ship was the property of the plaintiff." On these facts, the Court of Queen's Bench, and the Exchequer Chamber, on writ of error, held that the property in the vessel had passed to the plaintiff, Lord Campbell saying, when giving the judgment of the Court, that the terms which made the payments dependent on the vessel's being built to certain specific stages on the days appointed, were "as an indication of intention, substantially *the same as if the days had not been [*288] fixed, but the payments made to be due expressly when those stages had been reached." The case was determined mainly on the authority of *Woods v. Russell*,² and *Clarke v. Spence*.³

§ 382. [The rule of construction laid down in *Clarke v. Spence*¹ does not however apply where the contract is for work and materials to be supplied to a ship by way of repairs and alterations, although the contract provides for payment by instalments "as the work progresses," and upon the certificate of an inspector employed by the shipowner.²

¹ 5 B. & Ald. 942; *Anglo-Egyptian Navigation Co. v. Rennie*, L. R. 10 C. P. 271. *Upper Canada v. Killaly*, 21 Up. Can. Q. B. 9.

² 4 A. & E. 448, *ante*, p. 279.

³ 4 A. & E. 468. See also *Bank of* ² An agreement by which one party

Thus in the *Anglo-Egyptian Navigation Co. v. Rennie*³ in 1875, the defendants, a firm of engineers, had contracted to make and supply new boilers and machinery for a steamship belonging to the plaintiff company, and to make alterations in the engines of the steamship according to a specification. The engines and boilers, and connections, were to be completed in every way ready for sea, so far as specified, and tried under steam by the defendants before being handed over to the company, the result of the trial to be to the satisfaction of the company's inspector. *The price was to be paid by the company by instalments as the work progressed* in the following manner, viz., 2,000*l.* when the boilers were plated, 2,000*l.* when the whole of the work was ready for fixing on board, and 1,800*l.* the balance, when the steamship was fully completed and tried under steam. The work was to be executed to the satisfaction of the company's inspector, *upon whose certificate alone the payments were to be made.* The specification contained elaborate provisions as to the fitting and fixing the new boilers and machinery by the defendants on board the vessel, and the adaptation of the old machinery to the new. The defendants completed the boilers and other new machinery, which were ready to be fixed on board, and one instalment of 2,000*l.* had already been paid by the plaintiffs, when the vessel was lost by perils of the sea. Afterwards the plaintiffs, who knew of the loss of the [*284] vessel, although *the defendants did not, paid the second instalment of 2,000*l.* The plaintiffs then claimed delivery of the boilers and machinery, and upon the defendants' refusal to deliver them brought an action for their detention, or in the alternative to recover back the 4,000*l.* paid by them to the defendants. The Court held, that the contract was in substance one for work and labor to be done by the defendants for the plaintiffs, and not a

contracts to sell to the other, at the actual cost price thereof, all the material used in making barrels then in store, and the latter agrees to take and use it as fast as a sugar house should require the barrels, and to pay for it in notes with interest added,

running two months from the date thereof, settlements to be made semi-monthly, is an executory agreement and not a contract of sale. *Brock v. O'Donnell*, 45 N. J. L. (16 Vr.) 441; s. c. 8 Cent. Rep. 344.

³ L. R. 10 C. P. 271.

contract of sale; that it was an entire contract, and that the parties did not intend the property in any part of the boilers and machinery to pass to the plaintiffs until the whole of the work contracted to be done had been completed; and that as the completion of the contract had been rendered impossible by the destruction of the vessel, the plaintiffs were not entitled either to the boilers and machinery or to recover, as on a failure of consideration, the 4,000*l.* which they had already paid.]

§ 383. It is not necessary now to revert to this series of decisions on another point, namely, the effect of such contracts in passing property in the *materials* provided and the *parts prepared* for executing them, but not yet affixed to the ship or vessel.

In *Woods v. Russell*,¹ the builder became bankrupt on the 30th of June, and on the 2d of July, the purchaser of the ship took from the builder's yard and warehouse, a rudder and cordage, "which the builder had bought for the ship." All that the Court said, was: "As to the rudder and cordage, as they were bought by Paton specifically for this ship, though they were not actually attached to it at the time his act of bankruptcy was committed, they seem to us to stand on the same footing as the ship; and that if the defendant was entitled to take the ship, he was also entitled to take the rudder and cordage as parts thereof." This point did not arise in *Clarke v. Spence*, but in 1839 *Tripp v. Armitage*² was decided in the Exchequer. In that case there was a contract for building an hotel, and certain sash frames intended for the building were sent to it, examined, and approved by the superintendent, who then sent the frames back to the builder's shop, together with some iron pulleys, belonging to * the hotel owners, with directions to fit the pulleys [*285] into the sashes. This was done, but before the sashes, with the pulleys affixed, were taken away, the builder became bankrupt. The Court held, that the property in the frames had not passed out of the builder. Lord Abinger put it on the ground, "that there had been no contract for

¹ 5 B. & Ald. 942.

² 4 M. & W. 887.

the sale and purchase of goods as movable chattels, but a contract to make up materials and fix them, and until they are fixed, by the nature of the contract the property will not pass."⁸ His Lordship put as a test, that if the sashes had been destroyed by fire, the builder would have lost them, for the hotel owners were *not bound to pay for anything till put up and fixed*. Parke B. said, also: "In this case there is no contract at all with respect to these particular chattels: *it is merely parcel of a larger contract.*"

§ 384. In *Goss v. Quinton*,¹ in 1842, an unfinished ship, which the builder had contracted to deliver, was conveyed to the purchaser and registered in his name, but the rudder intended for the ship remained in the builder's yard, incomplete, when he became bankrupt. The Court held that proof that the builder *intended* the rudder for the ship, coupled with proof of the buyer's approval of this purpose, *though not given till after the bankruptcy*, was evidence for the jury that the rudder was part of the ship, and the right of property would be governed by the same considerations as would apply to the body of the ship. But this decision is much questioned, as will presently appear, and could not have been made if the test suggested by Lord Abinger in *Tripp v. Armitage* had been applied; for it is manifest that the incomplete rudder in the builder's yard was at his own risk, and if he had remained solvent, there would have been no pretext, in case of its destruction by fire, to call on the ship-owner to supply another rudder at his own expense.

§ 385. In *Wood v. Bell*,¹ the contest turned upon valuable materials as well as upon the frame of the ship, and the decision of the Queen's Bench on this part of [*286] the case was *reversed in the Exchequer Chamber.

The facts were that steam-engines were designed for the ship, and several parts which had been made so as to fit each other, forming a considerable portion of a pair of steam-engines, were spoken of constantly by the builder, be-

⁸ See *ante*, p. 102.

¹ 3 M. & G. 825.

¹ 5 E. & B. 772; 6 E. & B. 355; 25 L. J. Q. B. 148, 321.

fore his bankruptcy, as belonging to the "Britannia" engines, that being the name of the ship. There was also a quantity of iron plates and iron angles specially made and prepared to be riveted to the ship, lying partly at her wharf and partly elsewhere, as well as other materials in like condition, intended, manufactured, and prepared expressly for the ship, but not yet fixed or attached to her. The Queen's Bench, after holding that the property in the ship had passed, simply added, "and if this be so, it was scarcely contended but that the same decision ought to be come to with respect to the engines, plates, irons, and planking, designed and in course of preparation for her, and intended to be fixed in her. The question as to these last seems to be governed by the decision as to the rudder and cordage in *Woods v. Russell*." But in the Exchequer Chamber,² the decision was reversed, Jervis C. J. giving the judgment of the Court, composed of himself, Pollock C. B., Alderson and Bramwell BB., and Cresswell, Crowder, and Willes, JJ. It was held that it did not at all follow because the ship as constructed from time to time became the property of the party paying for her construction, that therefore the materials destined to form a part of the ship also passed by the contract. The Chief Justice said: "The question is, What is the contract? The contract is for the purchase of a ship, not for the purchase of everything in use for the making of the ship. I agree that *those things which have been fitted to and formed part of the ship would pass, even though at the moment they were not attached to the vessel*. But I do not think that those things which had merely been bought for the ship and intended for it would pass to the plaintiff. *Nothing that has not gone through the ordeal of being approved as part of the ship, passes, in my opinion, under the contract.*"

* The other judges concurred, and the case was sent [*287] back to the arbitrator for a new award on these principles, which must now be taken to be the settled law on the point under consideration.³

² 6 E. & B. 355, and 25 L. J. Q. B. 321.

³ See *Baker v. Gray*, 17 C. B. 462; 25 L. J. C. P. 161; *Brown v.*

In the opinion delivered by Jervis C. J., *Woods v. Russell* was doubted on the question of the rudder and cordage, and *Goss v. Quinton* was not only doubted by the learned Chief Justice, but was unfavorably mentioned by other Judges during the argument. Cresswell J. also said: "I am not now better satisfied with the ruling respecting the rudder and cordage in *Woods v. Russell* than I was years ago."

§ 386. Upon the third proposition stated at the beginning of this chapter, the reported case most directly in point is *Bishop v. Shillito*.¹ It was trover for iron that was to be delivered under a contract, which stipulated that certain bills of the plaintiff then outstanding were to be taken out of circulation. The defendant failed to comply with his promise after the iron had been in part delivered, and the plaintiff thereupon stopped delivery and brought *trover* for what had been delivered. Abbott C. J. left it to the jury to say whether the delivery of the iron and the re-delivery of the bills were to be contemporary, and the jury found in the affirmative. Scarlett contended that trover would not lie; that the only remedy was case for breach of contract. Held, on the facts as found by the jury, that the delivery was conditional only, and the condition being broken, trover would lie. Bayley J. added: "If a tradesman sold goods, to be paid for on delivery, and his servant by mistake delivers them without receiving the money, he may, after demand and refusal to deliver or pay, bring trover for his goods against the purchaser."

§ 387. The principle of this decision is fully recognized by the judges in *Brandt v. Bowlby*,¹ when holding that the property in a cargo ordered by one Berkeley did not pass to him, because by the terms of the bargain he was to
 [*288] * accept bills for the price as a condition concurrent with the delivery, and had refused to perform this

Bateman, L. R. 2 C. P. 272; cf. also
 Anglo-Egyptian Navigation Com-
 pany v. Rennie, L. R. 10 C. P. 271.
 See, also, Farfield Bridge Co. v.
 Neye, 60 Me. 372.

2 B. & Ald. 329, note (a).

¹ 2 B. & Ad. 932. And see
Shepherd v. Harrison, L. R. 4 Q. B.
 196, 493, L. R. 5 H. L. 116—more
 fully referred to, *post*, Ch. 6.

condition.² So in *Swain v. Shepherd*,³ it was held by Parke B. that if goods are sent on an order, to be returned if not approved, the property remains in the vendor till approval.

§ 388. To the same effect was the judgment of Lord Ellenborough in *Barrow v. Coles*.¹ This was trover for 100 bags of coffee shipped by Norton and Fitzgerald of Demerara. They drew for the value upon one Voss, in favor of Barrow the plaintiff, and sent to the latter the bill of lading attached to the bill of exchange. The bill of lading was endorsed so as to make the coffee deliverable to Voss if he should accept *and pay* the draft; if not, to the holder of the draft. When the bill of exchange was sent with the bill of lading to Voss, he accepted the bill of exchange, which was returned to the plaintiff, but detached the bill of lading, which he endorsed to the defendant for a valuable consideration. He did not pay the bill of exchange. Lord Ellenborough said that the coffees were deliverable to Voss only conditionally; that the defendant had notice of this condition by the endorsement on the bill of lading, and that by the dishonor of the bill of exchange the property vested in the holder of the bill of exchange, not in Voss or his assigns.

In a very old case, *Mires v. Solesby*,² the agreement was that one Alston should take home some sheep and pasture them for the owner at an agreed price per week till a certain date, and if at that date Alston would pay a fixed price for the sheep he should have them. Before the time arrived the owner sold the sheep, which were still in Alston's possession, to Mires, the plaintiff, and the Court held that the property had not vested in Alston, the condition of payment not having been performed, and that Mires could maintain trover for them under his purchase.

§ 389. [Under the now common form of agreement for the hire and conditional sale of furniture, the price to be

² See, also, 2 Wms. Saund. 47 u. note.

¹ 3 Camp. 92.

² 2 Mod. 243.

³ 1 Mood & Rob. 223. See Reitz's Appeal, 64 Pa. St. 162.

[*289] paid by *instalments, the property in the furniture does not pass until all the instalments have been paid.¹

¹ *Sales on instalment plan and leases.*

— Where it is apparent from the contract that though the transaction is nominally a hiring, but is in reality a conditional sale, the courts will regard the substance rather than the form in dealing with the contract. *Hegler v. Eddy*, 53 Cal. 597; *Kohler v. Hayes*, 41 Cal. 455; *Singer Co. v. Holcomb*, 40 Iowa, 33; *Greer v. Church*, 13 Bush (Ky.) 430; *Sumner v. Cottey*, 71 Mo. 121; *Cole v. Berry*, 42 N. J. L. (13 Vr.) 308; *Enlow v. Klein*, 79 Pa. St. 488; *Crist v. Kleber*, 79 Pa. St. 290; *Rowe v. Sharp*, 51 Pa. St. 26; *Brunswick v. Hoover*, 95 Pa. St. 508; s. c. 24 Alb. L. J. 186; *Hervey v. Rhode Island, L. W.* 93 U. S. (3 Otto) 664; bk. 23, L. ed. 1003; *Heryford v. Davis*, 102 U. S. (12 Otto) 235; bk. 26, L. ed. 160; *Myer v. Car Co.* 102 U. S. (12 Otto) 1; bk. 26, L. ed. 26. In those cases where the contract of the parties is such as to indicate that the seller shall retain his right of ownership to the property notwithstanding any partial payments that have been made or partial adjustment of the price, the condition of payment is enforceable as a prerequisite to the acquirement of the title by the buyer; *Hine v. Roberts*, 48 Conn. 268; s. c. 40 Am. Rep. 170; *Lucas v. Campbell*, 88 Ill. 447; s. c. 31 Am. Rep. 81; *Greer v. Church*, 13 Bush (Ky.) 433; *Giddey v. Altman*, 27 Mich. 206; *Preston v. Whitney*, 23 Mich. 260; *Sumner v. Cottey*, 71 Mo. 121; *Cole v. Mann*, 3 T. & C. (N. Y.) 380; *Sutton v. Campbell*, 2 T. & C. (N. Y.) 595; *Sage v. Sleutz*, 23 Ohio St. 1; *Singer Manuf. Co. v. Graham*, 8 Oreg. 17; s. c. 34 Am. Rep. 572; *Price v. McCallister*, 3 Grant Cas. (Pa.) 248; *Singer Manuf. Co. v. Cole*, 4 Lea (Tenn.) 439; s. c. 40 Am. Rep. 21; *Knittle v. Cushing*,

57 Tex. 354; s. c. 44 Am. Rep. 598, 600; *Goldsmith v. Bryant*, 26 Wis. 34; *Hervey v. R. I. Locomotive Works*, 93 U. S. (3 Otto) 664; bk. 23, L. ed. 1003; 2 *Schouler on Pers. Prop.*, sec. 297.

Construction of contract. — The courts will construe such contracts according to the tenor, give just scope to the mutual undertaking of the parties where the agreement contains an option to buy or hire in favor of one party, where there are other special conditions to be observed by the other party. *Hine v. Roberts*, 48 Conn. 267; s. c. 40 Am. Rep. 270; *Fleck v. Warner*, 25 Kans. 492; *Sumner v. Cottey*, 71 Mo. 121; *Meagher v. Hollenberg*, 9 Lea (Tenn.) 392; *Wheeler & W. Manuf. Co. v. Tetzlaff*, 53 Wis. 211. In those cases where there has been a sale of property made, the payments to be in instalments, with the reservation of title until the price has been paid. Many of the courts hold that partial payments are forfeited in case of a breach of contract on default of payment of the whole amount. *Latham v. Sumner*, 89 Ill. 233; s. c. 31 Am. Rep. 79; *Howe Mach. Co. v. Willie*, 85 Ill. 333; *Singer Manuf. Co. v. Treadway*, 4 Ill. App. 57; *Fleck v. Warner*, 25 Kans. 492; *Everett v. Hall*, 67 Me. 497; *Browne v. Haynes*, 52 Me. 578; *Colcord v. McDonald*, 128 Mass. 470; *Knox v. Perkins*, 81 Mass. (15 Gray) 529; *Angier v. Taunton Paper Co.*, 67 Mass. (1 Gray) 621; s. c. 61 Am. Dec. 436; *Duke v. Shackelford*, 56 Miss. 552; *Haviland v. Johnson*, 7 Daly (N. Y.) 297; *Whelan v. Couch*, 26 Grant (Ont.) 74. But the modern tendency of the doctrine in courts possessing equity powers is to allow the seller who rescinds a contract for default in payments of instalments due after

Thus in *Ex parte Crawcour*,² where there was an agreement between Crawcour and one Robertson for the hire of some furniture, under which, if Robertson paid certain instalments of money month by month the furniture was to become his property, he undertaking at the same time to deposit with Crawcour, as collateral security, promissory notes to the full amount of the instalments to be paid; it was *held*, that until the payment of all the instalments, the property in the furniture did not pass to Robertson.

having received a part of the price to retain only so much as will compensate him. *Hine v. Roberts*, 48 Conn. 267; s. c. 40 Am. Rep. 170; *Guilford v. McKinley*, 61 Ga. 230; *Johnson v. Whittemore*, 27 Mich. 463, 470; *Preston v. Whitney*, 23 Mich. 260, 267; *Minneapolis Har. Works v. Hally*, 27 Minn. 495; *Third Nat. Bank, &c. v. Armstrong*, 25 Minn. 530; *Ketchum v. Brennan*, 53 Miss. 596; *Mott v. Havana Nat. Bank*, 22 Hun (N. Y.) 354; *Gleason v. Knapp*, 26 Up. Can. C. P. 553. And where the seller permits the buyer to retain possession and receive payment after default, this operates as a waiver of the forfeiture and enables the buyer to become the owner of the property by making a tender of the residue of the price agreed upon. *Hegler v. Eddy*, 35 Cal. 597; *Blair v. Hamilton*, 48 Ind. 32; *Shepard v. Cross*, 33 Mich. 96; *Hutchings v. Munger*, 41 N. Y. 156; *Cushman v. Jewell*, 7 Hun (N. Y.) 525, 529; *Taylor v. Finley*, 48 Vt. 78.

Contracts for "renting." — It is generally held that agreements purporting to be contracts for "renting" articles are sales, and pass title to the vendee where the articles are taken on the instalment plan, if the price and the terms of payment show that the real transaction was intended to be a sale and that the terms of the transaction was resorted to in order to secure payment of the balance of the purchase money. *Lucas v. Campbell*, 88 Ill. 447, 449; s. c. 31 Am.

Rep. 81; *Greer v. Church*, 13 Bush (Ky.) 433; *Singer Manuf. Co. v. Graham*, 8 Oreg. 17; s. c. 34 Am. Rep. 572; *Price v. McCallister*, 3 Grant (Pa.) 248; *Singer Manuf. Co. v. Cole*, 4 Lea (Tenn.) 439; s. c. 40 Am. Rep. 21; *Knittle v. Cushing*, 57 Tex. 354; s. c. 44 Am. Rep. 598, 600.

Agreement for rent of article with option of purchase is contract of hiring. *Ludden, &c. Music House v. Dusenberry*, Sup. Ct. S. C. Nov. 25, 1887.

When there was a written agreement between G. and B. that G. should lease B. a piano, and B. should pay for the use thereof \$200 in advance, and \$50 quarterly thereafter, with 7 $\frac{1}{2}$ per cent. interest, until \$500 had been paid, when G. agreed to give B. a bill of sale, and G. was authorized to enter B.'s dwelling and remove the piano upon failure to make any payment, — Held, the lease amounted to a conditional sale. *Gorham v. Holden*, 79 Me. 317; s. c. 4 New Eng. Rep. 502.

Lease providing for payment of rent monthly for stated term, and giving lessor the right to take possession upon default, and giving lessee option to purchase upon payment of specified sum, is a contract of hiring and not a conditional sale. *Foreman v. Drake*, Sup. Ct. N. C. Nov. 21, 1887.

² 9 Ch. D. 419, C. A. As to this custom of furniture dealers, see *Ex parte Powell*, 1 Ch. D. 504, C. A. and *Crawcour v. Salter*, 18 Ch. D. 30 C. A.

It should be noted that the agreement in question expressly provided that the property should not pass until the payment of all the instalments, but it is submitted that the result would have been the same even in the absence of any such provision.]

§ 390. The cases in America upon the subject of this chapter are not in all respects identical with those decided in our Courts.

In *Crofoot v. Bennett*,¹ a portion of the bricks in a specified kiln were sold at a certain price per thousand, and the possession of the whole kiln was delivered to the vendee, that he might take the quantity bought. Held, that the property had passed in the number sold. Strong J. in delivering the opinion, said: "It is a fundamental principle pervading everywhere the doctrine of sales of chattels, that if goods be sold while mingled with others, by number, weight, or measure, the sale is incomplete, and the title continues with the seller until the bargained property be separated and identified. . . . The reason is that the sale cannot be applied to any article until it is clearly designated, and its identity thus ascertained. In the case under consideration, it could not be said with certainty that any particular bricks belonged to the defendant until they had been separated from the mass. If some of those in an unfinished state had been spoiled in the burning, or had been stolen, they could not have been considered as the property of the defendant, and the loss would not have fallen upon him. But if the goods sold are clearly identified, then, although it may be necessary to number, weight, or measure them, in order to ascertain what would be the price of the whole at a rate agreed upon between the parties, the title will pass. If a flock of sheep is sold at so much the head, and it is agreed that they shall be counted after the sale in order to determine the entire price of the whole, the sale is valid and complete. But if a given number out of the whole are sold, no title is acquired by the purchaser until

¹ 2 N. Y. 258.

they are separated, and their identity thus ascertained and determined. The distinction in all these cases does not depend so much upon what is to be done, *as upon the object which is to be effected by it*. If that is specification, the property is not changed; if it is merely to ascertain the total value at designated rates, the change of title is effected.”²

§ 391. [The same distinction was maintained in *Groat v. Gile*.¹ The defendant contracted to sell to the plaintiffs two flocks of sheep “except two bucks and a lame ewe,” at four dollars a head. The plaintiffs had examined the sheep, and the excepted animals had been identified; they also paid twenty-five dollars on account of the purchase. The sheep were to be taken, and the balance paid at a subsequent specified time; meanwhile the vendor was to pasture them. Within the time named the plaintiffs paid the balance of the purchase money, and took away the sheep; but meanwhile the defendant had shorn the sheep, and converted the wool to his own use. The action was to recover the value of the wool, and the plaintiffs were held entitled. The Court said, “All the parties understood what particular sheep and lambs were intended to be sold, and there is no doubt that they *were sufficiently identified. Under such cir- [*291] cumstances, when the terms of the sale were agreed on, and the payment of twenty-five dollars was made to the defendant on account of the purchase money by the plaintiffs, their liability became fixed for the balance, which was ascertainable by a simple arithmetical calculation based upon a count of the sheep and lambs, and the price to be paid per head for them. No delivery of them or other act whatever in relation to them by the defendant was required or intended. The plaintiffs were to *take* them without any agency in delivering them on the part of the defendant, and they from the time the agreement was made became the owners thereof.”]

² See, also, *Bradley v. Wheeler*, 44 N. Y. 495; *Groat v. Gile*, 51 N. Y. 431, and 2 Kent, 496.

¹ 51 N. Y. 431, where *Crofoot v. Bennett*, *Bradley v. Wheeler*, and *Kimberly v. Patchin*, cited below were referred to with approval.

§ 392. In *Kimberly v. Patchin*,¹ the owner of a large mass of wheat lying in bulk gave the vendee a receipt acknowledging himself to hold 6,000 bushels, sold for a specified price, subject to the vendee's order: and the title was held to have passed by the sale.² *Whitehouse v. Frost* (*post*, p. 297) was followed and approved.

In *Russell v. Carrington*,³ the Court of Appeal of New York applied the same principle to similar fact.

§ 393. In *Oliphant v. Baker*,¹ the vendor sold barley in bulk at a certain price per bushel, the quantity to be afterwards ascertained. The barley being in the vendor's storehouse, which was to be surrendered to another person at a future day, it was agreed that the barley should be allowed to remain in the storehouse till the vendor transferred the possession of the building: and the purchaser agreed with the transferee of the building to pay storage after that time. The goods were destroyed by fire before being measured, but after the building had passed out of the possession of the vendor. Held, that the facts showed an intention to pass the property in the barley notwithstanding it had not yet been measured, and that the loss must fall on the buyer.

§ 394. In *Rourke v. Bullens*,¹ the vendor sold a [*292] hog on credit, * the hog to be kept and fattened till the buyer called for it, and then to be paid for at the current market price according to its weight when called for, and this was held to be a contract purely executory, not passing the property to the buyer.

¹ 19 N. Y. 330. See, also, *Foot v. Marsh*, 51 N. Y. 288, where *Kimberly v. Patchin* was distinguished.

² The case of *Kimberly v. Patchin* has been distinguished in *Foot v. Marsh*, 51 N. Y. 288. Disapproved in *Commercial National Bank v. Gillette*, 90 Ind. 268; s. c. 46 Am. Rep. 222; denied in *Ferguson v. N. Bank Ky.*, 14 Bush (Ky.) 555; s. c. 29 Am. Rep. 418. See, also, *Waldron v. Chase*, 37 Me. 414; s. c. 59 Am. Dec. 56; *Keeler v. Goodwin*, 111 Mass. 490; *Hall v. Boston &*

Worcester R. R. Corp., 96 Mass. (14 Allen) 439, 443; *Warren v. Buckminster*, 24 N. H. 336; *Russell v. Carrington*, 42 N. Y. 118; s. c. 1 Am. Rep. 498; *Clark v. Griffith*, 24 N. Y. 595; *Woods v. McGee*, 7 Ohio, pt. 2, 127; s. c. 30 Am. Dec. 202; *Hutchinson v. Hunter*, 7 Pa. St. 140; *Young v. Miles*, 20 Wis. 615.

³ 42 N. Y. 118.

¹ 5 Denio (N. Y.) 379.

¹ 74 Mass. (8 Gray) 549. See *Marble v. Moore*, 102 Mass. 443.

§ 395. In *Cushman v. Holyoke*,¹ where the property had actually passed to the purchaser in goods that were to be taken by him to another place and there measured to fix the price, it was held that the vendor, and not the purchaser, must bear the loss and depreciation in measurement incident to the removal according to the common course of conveyance.

§ 396. The cases of *Woods v. Russell* and *Clarke v. Spence* have not met with universal acceptance in America. Thus, in *Andrews v. Durant*,¹ the New York Court of Appeal held in a case, where the facts were similar to those in the above cases, that the property did not pass to the party ordering the goods till the completion of the work: and the same decision was given in Massachusetts in *Williams v. Jackman*,² decided in the Superior Judicial Court in January, 1861. In these two cases the decision of the Exchequer Chamber in *Wood v. Bell*³ was not before the Courts, not being cited in the latter case, and the former case bearing date in 1853, three years before the decision in the Exchequer Chamber.⁴

§ 397. [In *Briggs v. A Light Boat*,¹ there was a contract to build three light vessels for the United States, and to deliver them completed within a fixed time, and to be governed during the progress of the building by the directions of an agent of the United States, and to perform the work to his satisfaction, for a price to be paid after their completion; and it was provided that the United States might at

¹ 34 Maine, 289.

¹ Kernan (N. Y.) 55.

² 16 Gray (Mass.) 514.

³ 6 E. & B. 355; 25 L. J. Q. B. 321.

⁴ Respecting the passing of title where the article is to be made. See, also, *Sandford v. The Wiggins Ferry Co.*, 27 Ind. 522; *Wright v. Tetlow*, 99 Mass. 397; *Briggs v. A Light Boat*, 89 Mass. (7 Allen) 287, 292; *Williams v. Jackman*, 82 Mass. (16 Gray) 514; *Elliott v. Edwards*, 35

N. J. L. (6 Vr.) 265; *The West Jersey R. R. Co. v. The Trenton Car Works Co.*, 32 N. J. L. (3 Vr.) 517; *Merritt v. Johnson*, 7 Johns. (N. Y.) 473; *Andrews v. Durant*, 11 N. Y. 35; s. c. 62 Am. Dec. 55; *Lang's Appeal*, 81 Pa. St. 18; *Coursin's Appeal*, 79 Pa. St. 220; *Scull v. Shakespear*, 75 Pa. St. 297; *Clarkson v. Stevens*, 106 U. S. (16 Otto) 605; bk. 27, L. ed. 139; *Scudder v. The Calais Steamboat Co.*, 1 Cliff C. C. 370.
¹ 89 Mass. (7 Allen) 287.

any time declare the contract null. It was held that under this contract no title to the vessels passed to the United

States until their completion and delivery. Bigelow [*293] C. J., in an exhaustive judgment, says *at p. 292

of the report: "Upon established principles of law, we think it clear that no property in the vessel, which is the subject of controversy in this action, vested in the United States until the vessel was completed and delivered, in pursuance of the contract with the builder. The general rule of law is well settled and familiar, that, under a contract for building a ship or making any other chattel, not subsisting in specie at the time of the contract, no property vests in the purchaser during the progress of the work, nor until the vessel or other chattel is finished and ready for delivery. To this rule there are exceptions, *founded for the most part on express stipulations in contracts*, by which the property is held to vest in the purchaser from time to time as the work goes on. It is doubtless true that a particular agreement in a contract concerning the mode or time of making payment of the purchase money, or providing for the appointment of a superintendent of the work, may have an important bearing in determining the question whether the property passes to the purchaser before the completion of the chattel. It is, however, erroneous to say, as is sometimes stated by text writers, that an agreement to pay the purchase money in instalments, as certain stages of the work are completed, or a stipulation for the employment of a superintendent by the purchaser to overlook the work, and see that it is done according to the tenor of the contract, will of itself operate to vest the title in the person for whom the chattel is intended. Such stipulations may be very significant, as indicating the intention of the parties, but they are not in all cases decisive. Both of them may co-exist in a particular case, and yet the property may remain in the builder or manufacturer. Even in England, where the cases go the farthest in holding that property in a chattel in the course of construction under a contract passes to and vests in the purchaser, these stipulations are not always deemed to be conclusive of title in him. *It is a question of intent arising on the interpretation of the*

entire contract in each case. If, taking all the stipulations together, it is clear that the parties intended that the property should vest in the purchaser during the progress of the * work, and before its completion, effect will [*294] be given to such intention, and the property will be held to pass accordingly; but, on the other hand, it will not be deemed to have passed out of the builder, unless such intent is clearly manifested, but the general rule of law will prevail." And he then proceeded to show that, upon the contract before him, no intention was indicated to take the case out of the general rule, but, on the contrary, there were several stipulations which clearly showed a different intention.]

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*CHAPTER IV.

SALE OF CHATTEL NOT SPECIFIC.

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§ 398. WHEN the agreement for sale is of a thing not specified, as of an article to be manufactured,¹ or of a certain quantity of goods in general, without a specific identification of them, or an "appropriation" of them to the contract, as it is technically termed, the contract is an executory agree-

¹ *Articles to be manufactured.*—Where an article is to be manufactured according to order, the contract is executory, and no title passes until the article is completed and notice of that fact given to the vendee or a tender made to him. *Moline S. Co. v. Beed*, 52 Iowa, 307, 310; s. c. 35 Am. Rep. 272; *Goddard v. Binney*, 115 Mass. 450; s. c. 15 Am. Rep. 112; *First National Bank of Marquette v. Crowley*, 24 Mich. 492; *Whitcomb v. Whitney*, 24 Mich. 486. On completion of the article and notice or tender, the title passes to the vendee subject to the lien of the manufacturer for the price, and a right of action accrues at once for such price. *Goddard v. Binney*, 115 Mass. 450; s. c. 15 Am. Rep. 112; *Spencer v. Cone*, 42 Mass. (1 Metc.) 283; *Mixer v. Howarth*, 38 Mass. (21 Pick.) 205; s. c. 32 Am. Dec. 256; *Muckey v. Howenstine*, 3 T. & C. (N. Y.) 28; *Higgins v. Murray*, 4 Hun (N. Y.) 565; aff'm 73 N. Y. 253; *Crookshank v. Burrell*, 18 Johns. (N. Y.) 58; s. c.

9 Am. Dec. 187; *Ballentine v. Robinson*, 46 Pa. St. 177. And after notice or tender the property remains at the risk of the vendee. *Goddard v. Binney*, 115 Mass. 450; s. c. 15 Am. Rep. 112; *Morse v. Sherman*, 106 Mass. 430; *Macomber v. Parker*, 30 Mass. (13 Pick.) 175, 183; *Tarling v. Baxter*, 6 Barn. & Cres. 360; *Bloxam v. Sanders*, 4 Barn. & Cres. 941; *Hinde v. Whitehouse*, 7 East, 571; 2 Kent Com. (12th ed.) 492; *Noys Maxims*, 89. However, there is some confusion in the authorities as to when the title passes to the purchaser in such case, some cases holding that the title does not pass under such a contract until the article is furnished and delivered, or at least until it is ready for delivery and approved by the purchaser. *Grippen v. New York Cent. R. R.*, 40 N. Y. 36; *Andrews v. Durant*, 11 N. Y. 35; s. c. 62 Am. Dec. 55; *Comfort v. Kiersted*, 26 Barb. (N. Y.) 473. See *Higgins v. Murray*, 73 N. Y. 252, 254; *Baker v. Bourcicault*, 1 Daly (N. Y.) 24.

ment, and the property does not pass.² There is but little difficulty in the application of this rule.

² *Browning v. Hamilton*, 42 Ala. 484; *Indianapolis P. & C. R. R. Co. v. Maguire*, 62 Ind. 140; *Smyth v. Ex'rs of Ward*, 46 Iowa, 339; *Scudder v. Worster*, 65 Mass. (11 Cush.) 573; *Warren v. Buckminster*, 24 N. H. 336; *Levey v. Lowndes*, 2 Low. Can. 257; *O'Neil v. McIlmoyle*, 34 Up. Can. Q. B. 236; *Robertson v. Strickland*, 23 Up. Can. Q. B. 221; *Pew v. Lawrence*, 27 Up. Can. C. P. 402; *Cox v. Jones*, 24 Up. Can. Q. B. 81; *McDougall v. Elliott*, 20 Up. Can. Q. B. 299; *Middlebrook v. Thompson*, 19 Up. Can. Q. B. 307; *Dunning v. Gordon*, 4 Up. Can. Q. B. 399. See *Chapman v. Shepard*, 39 Conn. 413; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Stephens v. Tucker*, 55 Ga. 543; *Morrison v. Woodley*, 84 Ill. 192; *Bell v. Farrar*, 41 Ill. 400; *Ferguson v. Louisville City Nat. Bank*, 14 Bush (Ky.) 555; *Newcomb v. Cabell*, 10 Bush (Ky.) 460; *May v. Hoaglan*, 9 Bush (Ky.) 171; *Moss v. Meshew*, 8 Bush (Ky.) 187; *Crawford v. Smith*, 7 Dana (Ky.) 59; *Cumberland Bone Co. v. Andes Ins. Co.*, 64 Me. 466; *Morrison v. Dingley*, 63 Me. 553; *Warren v. Milliken*, 57 Me. 97; *Waldron v. Chase*, 37 Me. 415; s. c. 59 Am. Dec. 56; *Ropes v. Lane*, 91 Mass. (9 Allen) 502; *Scudder v. Worcester*, 65 Mass. (11 Cush.) 573; *Merrill v. Hunnewell*, 30 Mass. (13 Pick.) 215, 218; *Gardner v. Dutch*, 9 Mass. 427; *Lamprey v. Sargent*, 58 N. H. 241; *Smart v. Batchelder*, 57 N. H. 140; *Bailey v. Smith*, 43 N. H. 141; *Warren v. Buckminster*, 24 N. H. 336; *Messer v. Woodman*, 22 N. H. 172; *Huff v. Hires*, 40 N. J. L. (11 Vr.) 581; s. c. 39 N. J. L. (10 Vr.) 4; *Kein v. Tupper*, 52 N. Y. 550; *Foot v. Marsh*, 61 N. Y. 288; *Kimberly v. Patchin*, 19 N. Y. 333; s. c. 75 Am. Dec. 334; *Rodee v. Wade*, 47 Barb. (N. Y.) 63; *Field v. Moore, Hill & Den.* (N. Y.) 418; *Hoyt v. Hartford*

Ins. Co., 26 Hun (N. Y.) 416; *Waldo v. Belcher*, 11 Ired. (N. C.) L. 609; *Woods v. McGee*, 7 Ohio, 2d pt. 127; s. c. 30 Am. Dec. 202; *Southwell v. Beezley*, 5 Oreg. 143; *Haldeman v. Duncan*, 51 Pa. St. 66, 70; *Golder v. Ogden*, 15 Pa. St. 528; s. c. 53 Am. Dec. 618; *Hutchinson v. Hunter*, 7 Pa. St. 140; *Pleasants v. Pendleton*, 6 Rand. (Va.) 473; s. c. 18 Am. Dec. 726; *Pollock v. Fisher*, 1 Allen (N. B.) 515; *Tompkins v. Tibbits*, 1 Han- nay (N. B.) 317; *Rigney v. Mitchell*, 2 Up. Can. C. P. 266; *Box v. Provincial Ins. Co.*, 15 Grant (Ont.) 337, 352.

Executory contracts. — A contract of sale where the article is to be delivered in the future is an executory contract. *Nance v. Metcalf*, 19 Mo. App. 183; s. c. 1 West. Rep. 443.

Where anything remains to be done to identify the subject of the sale, title does not pass. *Amer v. Hightower*, 70 Cal. 440; *Cornell v. Clark*, 104 N. Y. 451; s. c. 6 Cent. Rep. 506.

A written contract not executed in form to make a conveyance of an interest in land, which is expressed to be an agreement to sell and take, cut, and remove timber which is to be paid for in the form of bark lumber and timber, is an executory contract which passes no title in the standing timber. *United Society of Shakers v. Brooks*, 145 Mass. 410; s. c. 5 New Eng. Rep. 432.

Separation; when not essential to transfer of title. — Where a certain number of articles are sold from an ascertained lot, identical in kind and value, a separation is not essential to transfer title. *Kingman v. Holmquist*, 36 Kans. 735; s. c. 59 Am. Rep. 604. See *Horr v. Barker*, 8 Cal. 603; s. c. 11 Cal. 398; 70 Am. Dec. 791; *Chapman v. Shepard*, 39 Conn. 413; *Phillips v. Ocmulgee Mills*, 55 Ga.

633; *Piazzek v. White*, 23 Kans. 621; s. c. 33 Am. Rep. 211; *Waldron v. Chase*, 37 Me. 414; s. c. 59 Am. Dec. 56; *Gardner v. Dutch*, 9 Mass. 426; *Carpenter v. Graham*, 42 Mich. 191; *Kaufman v. Schilling*, 58 Mo. 218; *Hurff v. Hires*, 40 N. J. L. (11 Vr.) 581; s. c. 29 Am. Rep. 282; *Groat v. Gile*, 51 N. Y. 431; *Lobdell v. Stowell*, 51 N. Y. 70; *Clark v. Griffith*, 24 N. Y. 595; *Kimberly v. Patchin*, 19 N. Y. 330; s. c. 75 Am. Dec. 334; *Pleasants v. Pendleton*, 6 Rand. (Va.) 473; s. c. 18 Am. Dec. 726; *Young v. Miles*, 20 Wis. 615. Thus where A. had one hundred barrels of flour of the same kind, at a railroad station, with the charges paid, and in charge of the company as warehousemen, and he sold fifty barrels to B. and the balance to other parties, and gave to each an order on the company's agent therefor; B. took away seventeen barrels and left his receipt, the remainder of the fifty purchased were destroyed by fire, and it was held to be a valid sale. *Newhall v. Langdon*, 39 Ohio St. 87; s. c. 48 Am. Rep. 426. The court say: "We hold that upon facts found by the court, showing the well-known usage of the business, it is manifest that upon the presentation and acceptance of this order, the sale was completed, and the subsequent loss of the flour while stored at the depot must fall on the purchaser." Citing, *Aderholt v. Embry*, 78 Ala. 185; *McLaughlin v. Piatti*, 27 Cal. 463; *Horr v. Barker*, 8 Cal. 603; s. c. 70 Am. Dec. 791; *Smith v. Friend*, 15 Cal. 124; *Chapman v. Shepard*, 39 Com. 420; *Watts v. Hendry*, 13 Fla. 523; *Phillips v. Ocmulgee Mills*, 55 Ga. 634; *Morrison v. Woodley*, 84 Ill. 192; *Cloud v. Moorman*, 18 Ind. 40; *Morrison v. Dingley*, 63 Me. 553; *Waldron v. Chase*, 37 Me. 414; s. c. 59 Am. Dec. 56; *Cushing v. Breed*, 96 Mass. (14 Allen) 376; *Riddle v. Varnum*, 37 Mass. (20 Pick.) 282; *Macomber v. Parker*, 30 Mass. (13 Pick.) 175; *Gardner v. Dutch*, 9 Mass. 427; *Merchants' Bank v. Hib-*

bard, 48 Mich. 118; s. c. 42 Am. Rep. 465; *Carpenter v. Graham*, 42 Mich. 191; *Iron Cliffs Co. v. Buhl*, 42 Mich. 86; *Crapo v. Seybold*, 35 Mich. 169; s. c. 36 Mich. 444; *Lobdell v. Stowell*, 51 N. Y. 75; *Russell v. Carrington*, 42 N. Y. 118; s. c. 1 Am. Rep. 498; *Terry v. Wheeler*, 25 N. Y. 520; *Kimberly v. Patchin*, 19 N. Y. 330; s. c. 75 Am. Dec. 334; *Dexter v. Bevins*, 42 Barb. (N. Y.) 573; *Tyler v. Strang*, 21 Barb. (N. Y.) 198; *Olyphant v. Baker*, 5 Den. (N. Y.) 379; *Andrews v. Richmond*, 34 Hun (N. Y.) 24; *Keeler v. Vandervere*, 5 Lans. (N. Y.) 813; *Steel Works v. Dewey*, 37 Ohio St. 242; *Scott v. Wells*, 6 Watts & S. (Pa.) 362; *Anderson v. Levison*, Tex. App.; *Pleasants v. Pendleton*, 6 Rand. (Va.) 473; s. c. 18 Am. Dec. 726; *Hoffman v. King*, 58 Wis. 314; *Galloway v. Week*, 54 Wis. 604; *Howell v. Pugh*, 27 Kans. 702; *Young v. Miles*, 23 Wis. 643; *Whitehouse v. Frost*, 12 East, 614; *Turley v. Bates*, 2 Hurl. & C. 200; *Coffey v. Quebec Bank*, 20 Up. Can. C. P. 110, 555. But there is a hopeless conflict in the decisions on this subject, a goodly number of cases holding that on sale of a part of a quantity of goods of the same kind, no title passes without a separation or particular designation. *Fry v. Mobile Savings Bank*, 75 Ala. 473; *Block v. Maas*, 65 Ala. 211; *Browning v. Hamilton*, 42 Ala. 484; *McLaughlin v. Piatti*, 27 Cal. 463; *Central R. R. Co. v. Burr*, 51 Ga. 553; *Huntington v. Chisholm*, 61 Ga. 270; *Morrison v. Woodley*, 84 Ill. 192; *Carruthers v. McGarby*, 41 Ill. 15; *Dunlap v. Berry*, 5 Ill. (4 Scam.) 327; s. c. 39 Am. Dec. 413; *Commercial National Bank v. Gillette*, 90 Ind. 268; s. c. 46 Am. Rep. 222; *Bertelson v. Bower*, 81 Ind. 512; *Indianapolis P. & C. Co. v. Maguire*, 62 Ind. 140; *Lester v. East*, 49 Ind. 588, 594; *Scott v. King*, 12 Ind. 203; *Moffatt v. Green*, 9 Ind. 198; *Bricker v. Hughes*, 4 Ind. 146; *Murphy v. State*, 1 Ind. 366; *Rosenthal v. Risley*, 11 Iowa, 541; *Court-*

right v. Leonard, 11 Iowa, 32; Cook v. Logan, 7 Iowa, 142; Ferguson v. Northern Bank, 14 Bush (Ky.) 555; s. c. 29 Am. Rep. 418; Newcomb v. Cabell, 10 Bush (Ky.) 460; May v. Hoaglan, 9 Bush (Ky.) 471; Moss v. Meshew, 8 Bush (Ky.) 187; Crawford v. Smith, 7 Dana (Ky.) 59; Jennings v. Flanagan, 5 Dana (Ky.) 217; s. c. 30 Am. Dec. 683; Stone v. Peacock, 35 Me. 385; Brewer v. Smith, 3 Me. (3 Greenl.) 44; s. c. 14 Am. Dec. 213; Keeler v. Goodwin, 111 Mass. 490; Ropes v. Lane, 91 Mass. (9 Allen) 502; Scudder v. Worster, 65 Mass. (11 Cush.) 579; Merrill v. Hunnewell, 30 Mass. (13 Pick.) 213; Young v. Austin, 23 Mass. (6 Pick.) 280; Anderson v. Brennenman, 44 Mich. 198; Wilkinson v. Holiday, 33 Mich. 386; Hahn v. Fredericks, 30 Mich. 223; s. c. 18 Am. Rep. 119; Ober v. Carson, 62 Mo. 213; England v. Mortland, 3 Mo. App. 490; Bailey v. Smith, 43 N. H. 141; Ockington v. Richey, 41 N. H. 275; Fuller v. Bean, 34 N. H. 290; Warren v. Buckminster, 24 N. H. 337; Messer v. Woodman, 22 N. H. 172; Thompson v. Conover, 32 N. J. L. (3 Vr.) 466; Burrows v. Whitaker, 71 N. Y. 291; Foot v. Marsh, 51 N. Y. 288; Gardiner v. Suydam, 7 N. Y. 357; Rodee v. Wade, 47 Barb. (N. Y.) 63; Stevens v. Eno, 10 Barb. (N. Y.) 95; Rapelye v. Mackie, 6 Cow. (N. Y.) 250; Downer v. Thompson, 2 Hill (N. Y.) 137; Field v. Moore, Hill & Den. (N. Y.) 418; Fitch v. Beach, 15 Wend. (N. Y.) 221; Ward v. Shaw, 7 Wend. (N. Y.) 404; Dunkart v. Rineheart, 89 N. C. 357; Austin v. Dawson, 75 N. C. 523; Blakeley v. Patrick, 67 N. C. 40; s. c. 12 Am. Rep. 600; Waldo v. Belcher, 11 Ired. (N. C.) L. 609; Woods v. McGee, 7 Ohio, pt. 2, 127; s. c. 30 Am. Dec. 202; Hubler v. Gaston, 9 Oreg. 66; s. c. 42 Am. Rep. 794; Haldeman v. Duncan, 51 Pa. St. 66; Golder v. Ogden, 15 Pa. St. 528; s. c. 53 Am. Dec. 618; Hutchinson v. Hunter, 7 Pa. St. 140;

Leonard v. Winslow, 2 Grant (Pa.) 139; s. c. 24 Pa. St. 14; Fitzpatrick v. Fain, 3 Coldw. (Tenn.) 15; Robbins v. Chipman, 1 Utah, 355; s. c. 2 Utah, 347; Young v. Matthews, L. R. 2 C. P. 127; Martineau v. Kitching, L. R. 7 Q. B. 436; Simmons v. Swift, 5 Barn. & Cres. 857; s. c. 8 D. & R. 693; Zagury v. Furnell, 2 Campb. 240; Campbell v. Mersey Docks, 14 C. B. N. S. 412; s. c. 11 W. R. 596; 8 L. T. (N. S.) 245; Gillett v. Hill, 2 Compt. & M. 530; s. c. 4 Tyrw. 290; Wallace v. Breeds, 13 East, 522; Rugg v. Minett, 11 East, 210; Hanson v. Meyer, 6 East, 614; Aldridge v. Johnson, 7 El. & Bl. 885; Langton v. Higgins, 4 Hurl. & N. 402; Rusk v. Davis, 2 Maule & S. 398; Logan v. LeMesurier, 4 Moore Priv. C. Cas. 116; Shepley v. Davis, 5 Taunt. 617; White v. Wilks, 5 Taunt. 176; Austen v. Craven, 4 Taunt. 643; Pollock v. Fisher, 1 Allen (N. B.) 615; MacDougall v. Elliott, 20 Up. Can. Q. B. 299.

Sale of manufactured article; when property passes to purchaser.—Under a contract for the sale and purchase of a manufactured article, the property does not pass to the purchaser by his order to the manufacturer and its acceptance; there must be the selection and appropriation of one particular article, and facts showing an intention to pass the title or property to the purchaser. Jones v. Brewer, 79 Ala. 545. See Lewis v. Lofley, 60 Ga. 559; May v. Hoaglan, 9 Bush (Ky.) 171; Moss v. Meshew, 8 Bush (Ky.) 187; Bancher v. Warren, 33 N. H. 183; Randolph Iron Co. v. Elliott, 34 N. J. L. (5 Vr.) 184; Higgins v. Delaware & Lack. R. R., 60 N. Y. 553; Black v. Webb, 20 Ohio, 304; s. c. 55 Am. Dec. 456; Ormsbee v. Machir, 20 Ohio St. 295; Winslow v. Leonard, 24 Pa. St. 14; McCandlish v. Newman, 22 Pa. St. 460; Few v. Lawrence, 27 Up. Can. C. P. 402.

In *Wallace v. Breeds*,³ the sale was of fifty tons of Greenland oil "allowance for foot-dirt and water as customary." The vendors gave an order on the wharfingers for delivery to the purchasers of "fifty tons of our Greenland oil, ex-ninety tons." The purchasers became insolvent on the day after this order was sent to the wharfinger, and the order was then countermanded by the vendors, nothing having been done on it. *Held*, that the property had not passed.

So in *Busk v. Davis*,⁴ the vendor had about eighteen tons of Riga flax, in mats, lying at the defendant's wharf, and sold ten tons of it, giving an order to the purchaser on defendant for "ten tons Riga PDR. flax, ex *Vrouw Maria*." In order to ascertain what portion of the flax was to be appropriated to this order, it was necessary to weigh the mats, and this had not been done, when the buyer became insolvent, and the vendor thereupon countermanded the order.

Held, that the property had not passed.

[*296] § 399. *In *White v. Wilks*,¹ the sale was of twenty tons of oil, out of the vendor's stock in his cisterns. In *Austen v. Craven*,² the sale was by sugar refiners, of fifty hogsheads of sugar, double loaves, no particular hogsheads being specified. In *Shepley v. Davis*,³ of ten tons of hemp out of thirty; and the contracts were all held to be executory, no property passing.

In *Gillett v. Hill*,⁴ Bayley J. stated the law very perspicuously in the following words: "The cases may be divided into two classes; one in which there has been a sale of goods, and something remains to be done by the vendor, and until that is done, the property does not pass to the vendee; so as to entitle him to maintain trover. The other class of cases is where there is a bargain for a certain quantity, ex a greater quantity, and there is a power of selection in the vendor to deliver which he thinks fit; then the right to them does not pass to the vendee, until the vendor has made his selection, and trover is not maintainable till that is done. If I agree

³ 13 East, 522.

⁴ 2 M. & S. 397.

¹ 5 Taunt. 176.

² 4 Taunt. 644.

³ 5 Taunt. 617.

⁴ 2 C. & M. 530.

to deliver a certain quantity of oil, as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver until a selection is made. *There is no individuality until it has been divided.*⁵

§ 400. [In *Gabarron v. Kreeft*,¹ the sale was of all the iron ore, the produce of a certain mine in Spain. The contract provided that the price should be paid by the defendants' acceptances, to be given on a certificate, that the quantity of ore drawn for was in stock, and that thereupon the property in the ore so drawn for should vest in the defendants. In carrying out the contract the defendants' acceptances, at a particular time exceeded the amount of all the ore already shipped, so that the defendants were entitled to a further quantity of the ore then in stock, as to which, however, no certificate had been given. *Held*, that in the absence of any specific appropriation of the ore by the seller in fulfilment of *the contract no property in any of the [*297] ore in stock could vest in the defendants.]

§ 401. The only case to be found in the reports in apparent contradiction to this principle of the law of sale, is *Whitehouse v. Frost*,¹ which, notwithstanding explanations by the judges in subsequent cases, is scarcely ever mentioned, without suggestion of doubt or disapproval. In that case the contract was as follows: "Mr. J. Townsend bought of J. and L. Frost, ten tons of Greenland oil, in Mr. Stainforth's cisterns, *at your risk*, at 39*l.* — 390*l.*" There were then in the cistern forty tons of oil, which had belonged to Dutton and Bancroft, and they had sold ten tons of it to Frost and Co., and these were the ten tons which the latter sold to Townsend, giving Townsend an order on Dutton and Bancroft for "the ten tons of oil we purchased from you, 8th Nov. last." The order was taken to Dutton and Bancroft by the purchaser, and accepted by them in writing, on the face of the order. Townsend left the oil in the

⁵ See, also, *Campbell v. Mersey Docks Company*, 14 C. B. N. S. 412.

¹ L. R. 10 Ex. 274, fully considered, *post*, p. 345.

¹ 12 East, 614.

custody of Dutton and Bancroft, and it was not severed from the bulk in the cisterns. It was held, that the property had passed, as between Frost and Townsend. Lord Ellenborough put it on the ground, that all right in the seller was gone by the acceptance of his delivery order, in favor of Townsend, the seller never having had himself possession, but only a right to demand possession from the bailees, which right he had assigned to Townsend, just as it had been assigned to himself by his vendors. Grose J. was of opinion, that as the *risk was in the buyer*, and the delivery complete so far as the *vendor* was concerned, the property had passed. It was the *purchaser's* business to act with Dutton and Bancroft in drawing off the ten tons of oil. Le Blanc J. put it on the ground that the sale was complete between Frost and Townsend, because nothing remained to be done *between them*. The vendor had given to the purchaser the only possession that the vendor ever had, and the purchaser had accepted this, and Dutton and Bancroft were bailees of the oil [*298] for the **purchaser's* use. All that remained to be done was between the purchaser and *his* bailees. Bayley J. was very much of the same opinion, considering the purchaser's acceptance of an order on Dutton and Bancroft, his presentation of it to them, and obtaining their assent to be his bailees, as equivalent to a consent that the goods should be deemed to have been delivered to him. This case was much questioned in subsequent decisions.² In *Wallace v. Breeds*,³ Lord Ellenborough again said of *Whitehouse v. Frost*, "there nothing remained to be done by the seller to complete the sale between him and the buyer." And in the subsequent case of *Busk v. Davis*,⁴ where three of the judges (Lord Ellenborough, and Le Blanc and Bayley JJ.), who decided *Whitehouse v. Frost*, were still on the bench, they adhered to the decision, both Le Blanc and Bayley saying, however, that the sale was of an "undivided quantity," and that delivery had been made

² See *White v. Wilkes*, 5 Taunt. 176; *Austen v. Craven*, 4 Taunt. 644; *Campbell v. Mersey Company*,

14 C. B. N. S. 412; *Blackburn on Sale*, 125.

³ 13 East, 525.

⁴ 2 M. & S. 397.

of that undivided quantity so far as in the nature of things it was possible for the vendor to deliver it.⁵

⁵ *Storing of grain in warehouse.*—Where grain of different persons is stored in a warehouse and commingled in the same bin, with their knowledge and consent, they become tenants in common. See *Ferguson v. Louisville City National Bank*, 14 Bush (Ky.) 555; s. c. 29 Am. Rep. 418; *Morrison v. Woodley*, 84 Ill. 192; *Wilson v. Cooper*, 10 Iowa, 565; *Morrison v. Dingley*, 63 Me. 556, 557; *Warren v. Milliken*, 57 Me. 97; *Waldron v. Chase*, 37 Me. 414; s. c. 59 Am. Dec. 56; *Hall v. Boston & Worcester R. R. Corp.*, 96 Mass. (14 Allen) 439; *Cushing v. Breed*, 96 Mass. (14 Allen) 376; *Hatch v. Lincoln*, 66 Mass. (12 Cush.) 31; *Merchants' Bank v. Hibbard*, 48 Mich. 118; s. c. 42 Am. Rep. 465; *Russell v. Carrington*, 42 N. Y. 118; s. c. 1 Am. Rep. 498; *Kimberly v. Patchin*, 19 N. Y. 330; s. c. 75 Am. Dec. 334; *Chase v. Washburn*, 1 Ohio St. 244; s. c. 59 Am. Dec. 623; *South Australian Ins. Co. v. Randell*, L. R. 3 P. C. 101. And such grain may be sold in parcels without any separation of the quantity sold from the rest of the mass, if by request from the vendor and purchaser, the store-keeper agrees thenceforward to hold the quantity for the purchaser; and a valid title will pass of such sale, and the vendor and purchaser will become tenants in common of the whole grain in proportion to their respective interest therein. *Cushing v. Breed*, 96 Mass. (14 Allen) 380. The court say in this case: "This is not like the class of sales where the vendor retains the possession because there is something further for him to do, such as measuring, or weighing, as in *Scudder v. Worster*, 65 Mass. (11 Cush.) 573; nor like the case of *Weld v. Cutler*, 68 Mass. (2 Gray) 196, where the whole of a pile of coal was delivered to the vendee in order

that he might take the separation. But the property is in the hands of an agent; and the same person who was the agent of the vendor to keep, becomes the agent of the vendee to keep; and the possession of the agent becomes the possession of the principal. *Hatch v. Bayley*, 66 Mass. (12 Cush.) 27, and cases cited. The tenancy in common results from the method of storage which has been agreed upon, and supersedes the necessity of measuring, weighing or separating the part sold."

No delivery is necessary to a tenant in common. *Beaumont v. Crane*, 14 Mass. 400.

It has been questioned whether in cases of this kind, the title passing is one in severalty or in common; that if it is a title in common it is such in a qualified sense, and that the vendee can maintain trover for his share of the articles upon demand on the vendor and his refusal to deliver. See *Chapman v. Shephard*, 39 Conn. 413; *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *McPherson v. Gale*, 40 Ill. 368; *Burton v. Curyea*, 40 Ill. 320, 329; *Damon v. Osborn*, 18 Mass. (1 Pick.) 476; s. c. 11 Am. Dec. 229; *Gardner v. Dutch*, 9 Mass. 427; *Fiquet v. Allison*, 12 Mich. 328; *Kimberly v. Patchin*, 19 N. Y. 330; s. c. 75 Am. Dec. 334; *Crofoot v. Bennett*, 2 N. Y. 258; *Morgan v. Gregg*, 46 Barb. (N. Y.) 183; *Fobes v. Shattock*, 22 Barb. (N. Y.) 568; *Tripp v. Riley*, 15 Barb. (N. Y.) 335; *Channon v. Lusk*, 2 Lans. (N. Y.) 211; *Wood v. Fales*, 24 Pa. St. 246, 248; s. c. 64 Am. Dec. 655; *Pleasants v. Pendleton*, 6 Rand. (Va.) 473; s. c. 18 Am. Dec. 726; *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 426; *Buckley v. Gross*, 2 Best & S. 566, 575; *Whitehouse v. Frost*, 12 East, 614; *Busk v. Davis*, 2 Maule & S. 397. In *Morgan*

The cases in which those contracts are considered, by which the vendor agrees to make and deliver a chattel, are reviewed in the next chapter, on "Subsequent Appropriation."

v. Gregg, 46 Barb. (N. Y.) 183, upon a sale of barley by A. to B. for cash on delivery at the storehouse of C., and by agreement the money was to be left by B. with C. to pay the price. The court held that the fact that at the time the grain was, as delivered from day to day, at the storehouse of C., put into bins in which other grain belonging to B. was being put at the same time, was not such an admixture of the grain as to make the owners thereof tenants in common; no such tenancy being contemplated, and the admixture for no such purpose. *Parker P. J.*, in delivering the opinion of the court, says: "I am strongly inclined to think that the admixture of the grain, under the circumstances of this case, did not make the owners thereof tenants in common. The admixture was for no such purpose. The plaintiff delivered his barley either absolutely, intending to pass the title to Davis, or conditionally, intending to retain it himself, so that no tenancy in common was contemplated. The case of *Seldon v. Hickock*, 2 Cai. (N. Y.) 166, is an authority showing that the mere fact of an admixture does not necessarily produce a tenancy in common, and that each owner may own in severalty his share of the goods so mingled; especially when, as in that case, the property is all of one kind and value. The circumstances which give rise to the rule that an admixture produces a tenancy in common, is the loss of identity of the property mixed, making it impossible for each owner to reclaim his separate property. But where the property, so mixed, is of the same kind and of equal value, and the proportionate

shares are known, the loss of identity does not prevent each owner from claiming his separate share, and each may take and sell or destroy his share, without being liable to the owner of the other part. *Tripp v. Riley*, 15 Barb. (N. Y.) 334; *Forbes v. Shattuck*, 22 Barb. (N. Y.) 568. In such cases the admixture does not have the effect to change the title, unless so intended, but each owner continues to own his separate share as though no admixture had been made. The identity, in such case, is not deemed destroyed, so as to produce the consequences following a mixture of ingredients incapable of separation. *Story on Bailm.*, sec. 40; *Wilson v. Nason*, 4 Bosw. (N. Y.) 155. The tenancy in common exists only when the things mixed cannot be separated without inconvenience, in the proportion of the quantity, quality, and value belonging to each. *Wilson v. Nason*, 4 Bosw. (N. Y.) 157. In *Ryder v. Hathaway*, 38 Mass. (21 Pick.) 306, it is said: 'The intentional and innocent intermixture of property of substantially the same quality and value, does not change the ownership; and no one has a right to take the whole, but in so doing he commits a trespass on the other owner.' This, I am inclined to think, is the rule applicable to this case. The plaintiff, notwithstanding the admixture of the barley delivered by him, with barley delivered by others, did not lose his ownership, but remained owner of the 585 bushels delivered, as though it had not been so mixed. He had the right as against Davis, and consequently as against the defendant, his bailee, to take that amount from the common bulk, as held in 15 and 22 Barb.

§ 402. This seems to be an appropriate occasion for considering the question whether earnest has any, and what, effect in altering the property in the goods, which are the subject-matter of the contract.

In former times, when the dealings between men were few and simple, and consisted for the most part, where sale was intended, in the transfer of specific chattels, it was said that by the giving of earnest, the property passed. Thus we have seen in the second chapter of this book, that Shepherd's Touchstone contains this rule:¹ "If one sell me his horse, or any other thing for money, . . . and I give earnest money, albeit it be but a penny to the seller, . . . there *is a good bargain and sale of the thing to [*299] alter the property thereof." And Noy says (*ante*, p. 265): "If the bargain be that you shall give me 10*l.* for my horse, and you give me one penny in earnest, which I accept, this *is a perfect bargain*, you shall have the horse by an action on the case, and I shall have the money by an action of debt." But the context of both these passages shows very plainly that the authors were considering the subject of the different modes in which a bargain for the sale of a specific chattel could be completed, and were pointing out that the mere agreement of A. to buy, and B. to sell, did not constitute a bargain and sale, but that something further must be done "to bind the bargain." As soon as the bargain for the sale of the specific chattel was completed, *in whatever form*, the property passed, and the giving of earnest is included among the modes of binding the bargain, so that neither could retract, and then the passing of the property was the result, not of giving the earnest, but of the bargain and sale.

So in *Bach v. Owen*,² the plaintiff claimed a mare under a bargain in which "the defendants, to make the agreement

supra, and it follows that the defendant, in denying that right and refusing to permit him to have his own, was guilty of converting it, so as to entitle him to this action." *Bristol v. Burt*, 7 Johns. (N. Y.) 254; s. c. 5 Am. Dec. 264.

Transfer by delivery of warehouse receipt is a sufficient delivery to pass the title in such case. McPherson v. Gale, 40 Ill. 368; *Burton v. Curyea*, 40 Ill. 320, 329.

¹ *Ante*, p. 264.

² 5 T. R. 409.

the more firm and binding, paid to the plaintiff one halfpenny in earnest of the bargain." The contract was that the plaintiff should give a colt and two guineas for the mare, and the defendant demurred to the declaration for want of an averment that the plaintiff was ready and willing, or offered to deliver the colt; but Buller J. said: "The payment of the halfpenny vested the property of the colt in the defendant," and the tender was therefore unnecessary. This, again, was a perfect bargain and sale of a specific chattel, which altered the property as soon as the earnest given prevented either party from retracting.

§ 403. In *Hinde v. Whitehouse*,¹ Lord Ellenborough, in considering the mode of passing the property in the sugar sold, rejected a defence founded on the fact that the goods were not ready for delivery because the duties had not yet been paid, and said, *arguendo*: "Besides, after earnest given, * the vendor cannot sell the goods to another, without a default in the vendee; and, therefore, if the vendee do not come and pay for and take away the goods, the vendor ought to go and request him; and then if he do not come and pay for and take away the goods in a convenient time, *the agreement is dissolved*, and the vendor is at liberty to sell them to any other person." His Lordship, after quoting this *dictum* from Holt C. J. in *Langford v. Administratrix of Tyler*, Salk. 113, and Noy's Maxims, as above, continued: "On this latter ground, therefore, *I do not think that the sale is incomplete*." This, again, was the sale of a specific chattel, and the mind of that great judge was plainly intent on the question whether there had been a "*complete sale*," and the authorities on the subject of earnest were invoked solely to show that the bargain had been closed. Blackstone, also,² if his remarks be carefully considered, as well as the authorities to which he refers, contemplates earnest as a mode of binding the bargain, and thus furnishing proof of such a complete contract of sale as suffices to pass property in a specific chattel.

¹ 7 East, 558.

² 2 Black. Com. 447-9.

§ 404. No case, however, has been found in the books in which the giving of earnest has been held to pass the property in the subject-matter of the sale, where the completed bargain, if proved in writing or any other sufficient manner, would not equally have altered the property. It is difficult to conceive on what principle it could be contended that the giving of earnest would pass the property, for example, in fifty bushels of wheat, to be measured out of a larger bulk.¹ In the cases of *Logan v. Le Mesurier*,² and *Acraman v. Morris*,³ it was held, as we have already seen (*ante*, p. 270-1), that where the *whole purchase-money* had been paid at the time of the contract, the property did not pass in the timber which was to be afterwards measured on delivery, and it is scarcely conceivable that a penny, delivered under the name of "earnest," could be more effective in altering the property than the payment of the entire price.

* It is therefore submitted that the true legal effect [*301] of earnest is simply to afford conclusive evidence that a bargain was actually completed with mutual intention that it should be binding on both; and that the inquiry whether the property has passed in such cases is to be tested, not by the fact that earnest was given, but by the true nature of the contract concluded by the giving of the earnest.

¹ See *Morrison v. Dingley*, 63 Me. 558; *Nesbit v. Burry*, 25 Pa. St. 208, 210; *United States v. Woodruff* (Elgee Cotton Cases), 89 U. S. (22 Wall.) 180, 195; bk. 22, L. ed. 863. The court say in *Jennings v. Flannagan*, 5 Dana (Ky.) 217; s. c. 30 Am. Dec. 683, that payment of earnest does not necessarily change the property; it only binds the bargain, and that the buyer cannot maintain trover or detinue for his purchase, without paying or tendering the residue of the price. The court say that "notwithstanding the payment of earnest, if the whole price is to be paid, delivery of the thing bought, of which there was no delivery at the time of the contract, the purchaser cannot maintain detinue or trover for the property bought until he should have paid or tendered

the entire consideration." It has been said that the courts will lay hold of slight circumstances, to retain in the vendor the property until the whole purchase money has been paid. See *Hurff v. Hires*, 40 N. J. L. (11 Vr.) 581; *Swannick v. Sothern*, 9 Ad. & E. 895; *Godts v. Rose*, 17 C. B. 229; *Hanson v. Meyer*, 6 East, 614; *Wallace v. Breeds*, 13 East, 522; *Busk v. Davis*, 2 Maule & S. 397; *Shepley v. Davis*, 5 Taunt. 616. But it will be different where the whole price is paid. *Waldron v. Chase*, 37 Me. 414; *Terry v. Wheeler*, 25 N. Y. 520; *Filkins v. Whyland*, 24 N. Y. 338. See *Blood v. Harrington*, 25 Mass. (8 Pick.) 552; *Dunn v. Hewitt*, 2 Den. (N. Y.) 637.

² 6 Moo. P. C. 118.

³ 8 C. B. 449.

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*CHAPTER V.

OF SUBSEQUENT APPROPRIATION.

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§ 405. AFTER an executory contract has been made, it may be converted into a complete bargain and sale by specifying the goods to which the contract is to attach, or in legal phrase, by the *appropriation* of specific goods to the contract. The sole element deficient in a perfect sale is thus supplied. The contract has been made in two successive stages, instead of being completed at one time; but it is none the less one contract, namely, a bargain and sale of goods. As was said by Holroyd J. in *Rohde v. Thwaites*,¹ "the selection of the goods by one party, and the adoption of that act by the other, converts that which before was a mere agreement to sell into an actual sale, and the property thereby passes."²

The only difficulty that can arise on this question is in

¹ 6 B. & C. 388.

² *Claffin v. Boston & L. R. R. Co.*, 89 Mass. (7 Allen) 341; *Hyde v. Lathrop*, 2 Abb. App. Dec. (N. Y.) 436. See *Crawford v. Smith*, 7 Dana (Ky.) 59, 61; *Gough v. Edelen*, 5 Gill (Md.) 101; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295;

Chapman v. Searle, 20 Mass. (3 Pick.) 38; *Thompson v. Conover*, 32 N. J. L. (3 Vr.) 466; *Bickford v. Grand Junc. Ry. Co.*, 1 Duv. (Can.) 696, 723; *Coleman v. McDermot*, 5 Up. Can. C. P. 303; *Macpherson v. Fred-erickson Boom Co.*, 1 Hannay (N. B.) 337.

cases where the vendor only has made the subsequent appropriation. If it has been agreed that the purchaser shall select out of the bulk belonging to the vendor, it is not easy to raise a controversy, but the cases in which the ablest judges have been much perplexed are those where the vendor *is, by the express or implied terms of [*303] the contract, entitled to make the selection. A very common mode of doing business is for one merchant to give an order to another to send him a certain quantity of merchandise, as so many tons of oil, so many hogsheads of sugar. Here it becomes the vendor's duty to *appropriate the goods to the contract*. The difficulty is to determine what constitutes the appropriation: to find out at what precise point the vendor is no longer at liberty to change his intention. It is plain that the vendor's act in simply selecting such goods as he *intends* to send, cannot change the property in them. He may lay them aside in his warehouse, and change his mind afterwards; or he may sell them to another purchaser without committing a wrong, because they do not yet belong to the first purchaser, and the vendor may set aside other goods for him. It is a question of law whether the selection made by the vendor in any case is a mere manifestation of his intention, which may be changed at his pleasure, or a determination of his right conclusive on him, and no longer revocable.

§ 406. The rule on the subject of election is, that when, from the nature of an agreement, an election is to be made, the party who is by the agreement to do the first act, which, from its nature, cannot be done till the election is determined, has authority to make the choice, in order that he may be able to do that first act, and when once he has done that act, the election has been irrevocably determined, but till then he may change his mind.¹

¹ Heyward's Case, 2 Co. 36; Co-myn's Dig. Election; Blackburn on Sale, 128.

The Supreme Court of Massachusetts have held, in *Lynch v. O'Donnell*, 127 Mass. 311, that where intox-

icating liquors are sold "under an agreement that the sale shall be at the seller's shop, and the liquors taken by him to a railroad depot to be sent to the purchaser, and the seller, upon receipt of an order by

For example, suppose A. sell out of a stack of bricks one thousand to B., who is to send his cart and fetch them away. Here B. is to do the first act, and cannot do it till the election is determined. He therefore has authority to make the choice, but he may choose first one part of the stack and then another, and repeatedly change his mind, until he has done the act which determines the election, that is, until

he has put them in his cart to be fetched away;
[*304] * when that is done, his election is determined, and

he cannot put back the bricks and take others from the stack. So, if the contract were that A. should load the bricks into B.'s carts, A.'s election would be determined as soon as that act was done, and not before.²

§ 407. It follows from this, says Lord Blackburn, that where from the terms of an executory agreement to sell unspecified goods the vendor is to *despatch* the goods, or do anything to them that cannot be done till the goods are appropriated, he has the right to choose what the goods shall be; and *the property is transferred the moment the despatch or other act has commenced*, for then an appropriation is made finally and conclusively by the authority conferred in the agreement, and in Lord Coke's language, "the certainty, and thereby the property begins by election."¹ But however clearly the vendor may have expressed an intention to

mail, puts up the liquors, marks them with the buyer's name, labels them, and sets them aside with a bill of lading attached to them, with the intent to pass the title in the liquors to the buyer, a jury will be warranted in finding that there was a complete sale of the liquors at the shop of the seller."

² See *Rohde v. Thwaites*, 6 Barn. & Cr. 388; *Marquand v. Banner*, 6 El. & Bl. 232; *Coffey v. Quebec Bank*, 20 Up. Can. C. P. 110, 555; *Waddell v. Macbride*, 7 Up. Can. C. P. 382; *Blackburn on Sales*, 127.

¹ *Heyward's Case*, 2 Coke, 36; *Merchants' National Bank v. Bangs*, 102 Mass. 291, 295.

See, also, *Wigton v. Bowley*, 130 Mass. 254; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 292, 295; *Stevens v. Boston & W. R. R. Corp.*, 74 Mass. (8 Gray) 262; *Coggill v. Hartford & N. H. R. R. Co.*, 69 Mass. (3 Gray) 545; *Hatch v. Lincoln*, 66 Mass. (21 Cush.) 31; *Stanton v. Eager*, 33 Mass. (16 Pick.) 473; *Allen v. Williams*, 29 Mass. (12 Pick.) 297; *Moakes v. Nicolson*, 19 C. B. (N. S.) 290; *Godts v. Rose*, 17 C. B. 229; *Tregelles v. Sewell*, 7 Hurl. & N. 574; *Dunning v. Gordon*, 4 Up. Can. Q. B. 399. See, also, *Grove v. Brien*, 49 U. S. (8 How.) 429; bk. 12, L. ed. 1142; *Gibson v. Stevens*, 49 U. S. (8 How.) 384; bk. 12, ed. 1123.

choose particular goods, and however expensive may have been his preparations for performing the agreement with those particular goods, yet until the act has actually commenced, the appropriation is not yet final, for it is not made by the authority of the other party nor binding on him.²

§ 408. A review of the authorities will show the subtle distinctions to which this subject gives rise, and the infinite diversity of circumstances under which its application becomes necessary in commercial dealings. The considerations that govern it are rendered still more complex when the vendor, although appropriating the goods to the contract by despatching them, still retains control by taking the bills of lading or other documents of title in his own name, in order to secure himself against loss in the event of the buyer's insolvency or refusal to pay. The decisions in cases where the vendor, although appropriating the goods, has reserved expressly or by implication a special property in them, will * be separately examined, after disposing of those [*305] which are free from this element of controversy.

§ 409. In 1803, in the case of *Dutton v. Solomonson*,¹ it was treated as already settled law that where a vendor delivers goods to a carrier by order of the purchaser, the appropriation is determined; the delivery to the carrier is a delivery to the vendee, and *the property vests immediately*.

And in the United States the law is established to the same effect.²

² Blackburn on Sale, p. 128. The accuracy of this statement of the law was attested by Erle J. in *Aldridge v. Johnson*, 7 E. & B. 885, 901; 26 L. J. Q. B. 296.

¹ 3 B. & P. 582, per Lord Alvanley Ch. J.; and see *Cork Distilleries Co. v. Great Southern, &c. Railway Co.*, L. R. 7 H. L. 269; and *Johnson v. The Lancashire and Yorkshire Railway Co.*, 3 C. P. D. 499, where, under somewhat curious circumstances, the same rule was applied. See, also, *Dutton v. Solomonson*, 3 Bos. & Pul. 584; *Cooke v. Ludlow*, 2 Bos. & Pul.

N. R. 119; *Vale v. Bayle*, Cowp. 294; *Dawes v. Peck*, 8 T. R. 330.

² *Krulder v. Ellison*, 47 N. Y. 36. See, also, *Devine v. Edwards*, 101 Ill. 138; *Stafford v. Walter*, 67 Ill. 83; *Torrey v. Corliss*, 33 Me. 336; *Wing v. Clark*, 24 Me. 366; *Barry v. Palmer*, 19 Me. 303; *Suit v. Woodhall*, 113 Mass. 394; *Odell v. Boston & M. R. R.*, 109 Mass. 50; *Johnson v. Stoddard*, 100 Mass. 306, 308; *Kline v. Baker*, 99 Mass. 253, 254; *Hunter v. Wright*, 84 Mass. (12 Allen) 548; *Putnam v. Tillotson*, 54 Mass. (13 Metc.) 517; *Stanton v. Eager*, 33

§ 410. In 1825, *Fragano v. Long*¹ was decided in the King's Bench. The plaintiff sent an order from Naples to M. and Sons at Birmingham, for merchandise "to be despatched on insurance being effected. Terms to be three months' credit from the time of arrival." The goods were sent from Birmingham, marked with the plaintiff's name, to the agents of the vendors in Liverpool, with orders to ship them to the plaintiff. Insurance was made in the plaintiff's name. The goods were injured by the carrier by being allowed to fall into the water while loading them, and the action was assumpsit against the carrier. It was contended by the defendant that the property had not passed because the vessel's receipt expressed that the goods were received from the Liverpool shippers, the agents of the vendors, and they would therefore have been entitled to the bill of lading. But the Court held that the property had passed to the plaintiff from the time *the goods left the vendors' warehouse*. Holroyd J. said the principle was that "when goods are to be delivered at a distance from the vendor, *and no charge is made by him for the carriage*, they become the property of the buyer as soon as they are sent off." The words above printed in italic suggest that where the vendor pays the charges it is presumed that he retains the property in [*306] the *goods. On this point the reader will find a very full exposition of the law in the elaborate opinion of Lord Cottenham, delivering the judgment of the House of Lords in *Dunlop v. Lambert*.²

Mass. (16 Pick.) 467; *Armentroul v. St. Louis, &c. Ry. Co.*, 1 Mo. App. 158; *Arnold v. Prout*, 51 N. H. 587, 589; *Garland v. Lane*, 46 N. H. 245, 248; *Smith v. Smith*, 27 N. H. 252; *Woolsey v. Bailey*, 37 N. H. 217; *Rodgers v. Phillips*, 40 N. Y. 519; *Ludlow v. Bowne*, 1 Johns. (N. Y.) 1, 15; s. c. 3 Am. Dec. 277; *Griffith v. Ingledew*, 6 Serg. & R. (Pa.) 429; s. c. 9 Am. Dec. 444; *Strong v. Dodds*, 47 Vt. 348; *Sortwell v. Hughes*, 1 Curt. C. C. 244.

Delivery of goods by consignor to a common carrier prima facie vests the

right to immediate possession thereof in the consignee, and the effect of a consignment of goods by a bill of lading is to vest the property in the consignee. *Walsh v. Blakely*, 6 Mont. 194.

¹ 4 B. & C. 219.

² 6 Cl. & Finn. 600. See *Packard v. Getman*, 6 Cow. (N. Y.) 757; s. c. 16 Am. Dec. 475; *Pittsburg, C. & St. L. Ry. Co. v. Barrett*, 36 Ohio St. 448; *Sneathen v. Grubbs*, 88 Pa. St. 147; *Hobart v. Littlefield*, 13 R. I. 341; *The M. K. Rawley*, 2 Low. C. C. 447; *British Columbia S. M. Co. v. Nettle-*

§ 411. In *Rohde v. Thwaites*,¹ the appropriation by the vendor was assented to by the purchaser. The purchaser bought twenty hogsheads of sugar out of a lot of sugar in bulk belonging to the vendor. Four hogsheads were filled and delivered. Sixteen other hogsheads were then filled up and appropriated to the contract by the vendor, who gave notice to the purchaser to take them away, which the latter promised to do. *Held*, that this was an assent to the appropriation, that the contract was thereby converted into a bargain and sale, and that the property passed.

§ 412. In *Alexander v. Gardner*,¹ decided in 1835, the property in a parcel of butter was held to have passed from the plaintiff to the defendant by subsequent appropriation with mutual assent under the following circumstances. The original contract was for "200 firkins Murphy & Co.'s Sligo butter at 71s. 6d. per cwt. free on board; payment, bill at two months from the date of lading; to be shipped this month. 11 Oct., 1833." On the 11th of November the plaintiff received from Murphy an invoice and bill of lading for these butters, which had not been shipped till the 6th of November. Defendant waived the delay, and consented to take the invoice and bill of lading, which described the butter, the weights and marks of the casks, &c. The butter was afterwards lost by shipwreck. *Held*, that the subsequent appropriation was complete by mutual assent; that the property had passed, and the buyer must suffer the loss. The case was decided directly on the authority of *Fragano v. Long and Rohde v. Thwaites*.

§ 413. The same principle governed *Sparkes v. Marshall*,¹ decided by the same Court in the following year (1836). *Bamford, a corn-merchant, sold to plain- [*307] tiff "500 to 700 barrels of prepared black oats, at 11s. 9d. per barrel, to be shipped by Thomas John and Son,

ship, L. R. 3 C. P. 499, 503. See, also, *Stanton v. Eager*, 33 Mass. (16 Pick.) 467; *Bolin v. Huffnagle*, 1 Rawle (Pa.) 9; *Ogle v. Atkinson*, 5 Taunt. 759.

¹ 6 B. & C. 388. Distinguished

in *Scotten v. Sutter*, 37 Mich. 526, 532.

¹ 1 Bing. N. C. 671. See, also, *Wilkins v. Bromhead*, 6 M. & G. 963; s. c. 7 Scott N. R. 921.

¹ 2 Bing. N. C. 761.

of Youghall." The oats were to be delivered at Portsmouth. Some days afterwards Bamford informed plaintiffs that Messrs. John and Son had engaged "room in the schooner Gibraltar Packet of Dartmouth to take about 600 barrels of black oats on your account." Plaintiff next day ordered insurance, "400*l.* on oats per the Gibraltar Packet of Dartmouth, &c." In this action against the underwriters it was contended by them that the property had not passed, but the Court held the contrary. Tindal C. J. said that Bamford's letter to the plaintiff "was an unequivocal appropriation of the oats on board the Gibraltar Packet," and "this appropriation is assented to and adopted by the plaintiff, who, on the following day, gives instructions to his agent in London to effect the policy on oats *per* Gibraltar Packet."

§ 414. In *Bryans v. Nix*,¹ decided in the Exchequer in 1839, the facts were, that one Tempany, in Longford, drew a bill of exchange on the plaintiff at Liverpool, against two cargoes of oats, *per* boats Nos. 604 and 54, represented by two boat receipts or bills of lading, whereby the masters of the boat acknowledged to have received the oats on board, deliverable in Dublin to the plaintiff's agents, for shipment thence to the plaintiff at Liverpool. The plaintiff received, on the 7th of February, a letter from Tempany, dated the 2d, containing these two boat receipts, dated the 31st of January, and thereupon accepted the bill of exchange which Tempany stated in a letter to be drawn *against these oats*. In point of fact, boat No. 604 had received its cargo, but although the master's receipt for boat 54 was dated on the 31st of January, the loading of it was only begun on the 1st of February, and on the 6th it had received only about 400

¹ 4 M. & W. 775. See *First Nat. Bank of Green Bay v. Dearborn*, 11 Mass. 219, 222; s. c. 15 Am. Rep. 92; *Prince v. Boston & L. R. R. Corp.*, 101 Mass. 542; *De Wolf v. Gardner*, 66 Mass. (12 Cush.) 19, 24; s. c. 59 Am. Dec. 165; *Allen v. Williams*, 29 Mass. (12 Pick.) 297, 301; *Gardner v. Howland*, 19 Mass. (2 Pick.) 599;

Bank of Rochester v. Jones, 4 N. Y. 497; s. c. 55 Am. Dec. 290; *Grove v. Brien*, 49 U. S. (8 How.) 429; bk. 12, L. ed. 1142; *Gibson v. Stevens*, 49 U. S. (8 How.) 384; bk. 12, L. ed. 1123; *Anderson v. Clark*, 2 Bing. 20; *Haillie v. Smith*, 1 Bos. & Pul. 563; *Evans v. Nichol*, 3 Man. & Gr. 614.

barrels out of the 530 barrels called for by the receipt. On that day, the 6th, Tempany, pressed by the importunity of the defendant, to whom he was largely indebted, gave to the defendant an order for both the boat-loads, addressed to Tempany's agent * in Dublin, and the latter accepted the order and agreed to forward the cargoes to the defendant in London. The defendant obtained possession of the oats in Dublin, and the plaintiff demanded them from him, and brought action on his refusal to deliver them. The loading of the boat No. 54 was completed on the 9th of February. On these facts, after elaborate argument and time for advisement, Parke B. delivered the judgment of the Exchequer of Pleas, holding, that the property in the cargo No. 604 had vested in the plaintiff but not the cargo No. 54. In relation to the first cargo, the decision was on the ground that "the intention of the consignors was to vest the property in the consignee from the moment of delivery to the carrier, and the case resembles that of *Haille v. Smith* (1 B. & P. 563), where the bill of lading being transmitted for a valuable consideration, operated as a change of property instanter when the goods were shipped; and it is also governed by the same principle upon which I know that of *Anderson v. Clark*² was decided, where a bill of lading making the goods deliverable to a factor was upon proof from correspondence of the intention of the principal to vest the property in the factor as security for antecedent advances, held to give him a special property the instant the goods were delivered on board, so as to enable him to sue the master of the ship for their non-delivery." In relation to the cargo of No. 54, however, the ground was that there were no specific chattels appropriated to it. The reasoning on this part of the case is submitted in full, because it does not seem altogether reconcilable with the subsequent case of *Aldridge v. Johnson*, *post*, so far as regards the 400 barrels that had actually been put on board, destined for the plaintiff, *before* Tempany was persuaded to give an order for them in favor of the defendant. The learned Baron said (p. 792): "At

² 2 Bing. 20.

the time of the agreement, proved by the bill of lading or boat receipt of the 31st of January, to hold the 530 barrels therein mentioned for the plaintiffs, there were no such oats on board, and consequently no specific chattels which were held for them. The undertaking of the boat-master [*309] had *nothing to operate upon, and though Miles

Tempany had prepared a quantity of oats to put on board, those oats still remained his property: he might have altered their destination and sold them to any one else: the master's receipt no more attached to them than to any other quantity of oats belonging to Tempany. If, indeed, after the 31st of January, these oats so prepared, or any other like quantity, had been put on board to the amount of 530 barrels, or less, *for the purpose of fulfilling the contract, and received by the master as such*, before any new title to these oats had been acquired by a third person, we should probably have held that the property in these oats passed to the plaintiffs, and that the letter and receipt, though it did not operate as it purported to do, as an appropriation of any existing specific chattels, at least operated as an executory agreement by Tempany and the master and the plaintiffs, that Tempany should put such a quantity of oats on board for the plaintiffs, and that when so put the master should hold them on their account; and when that *agreement was fulfilled*, then, but not otherwise, they would become their property. But before the complete quantity of 530 barrels was shipped, and when a small quantity of oats only were loaded,³ and before any appropriation of oats to the plaintiffs had taken place, Tempany was induced to enter into a fresh engagement with the defendant, to put on board for him a full cargo for No. 54, by way of satisfaction for the debt due to him, for such is the effect of the delivery order of the 6th, and the agreement with Walker of the same date, to send the boat receipt for the cargo of that vessel. Until the oats were appropriated

³ The reporter's statement, p. 778, is that on the 6th of February, when defendant's agent first pressed Tempany for security, "boat 54 was still in the canal harbor at Longford,

partly loaded, the loading having begun on the 1st of February, and about 400 barrels being then on board."

by some new act, both contracts were executory; on the 9th this appropriation took place by the boat receipt for the 530 barrels *then on board*, which was signed by the master, at the request of Tempany, whereby the master was constituted the agent of the defendant to hold these goods; and this was the first act by which *these oats* * were specifically appropriated to any one. The master might have insisted on Tempany's putting on board oats to the amount of the first bill of lading, *on account of the plaintiffs*, but he did not do so."

§ 415. The difficulty felt in receiving this decision as satisfactory, arises chiefly from the difference between the facts as stated by the reporter and found by the jury, and the facts as assumed in the opinion of the Court. The trial at *Nisi Prius* was before Williams J., who told the jury to consider, as regards the cargo of No. 54, "whether, although the loading was not complete, the oats to be put on board were *designated and appropriated to the plaintiff*, as if they were, he was of opinion that they were entitled to recover that cargo also." The jury found for the plaintiff, finding also, as a fact, "that at the time the receipts were given, the cargo for boat 54 was specially designated, although the loading was not complete." But in the opinion of Parke B. the quantity loaded at the time when Tempany assumed the power of diverting it to a new consignee, is treated as a trifle, "only a small quantity," instead of about three-fourths of the whole, as stated by the reporter, and no notice is taken of the ruling of Williams J. or the finding of the jury, although in some earlier passages of the opinion it is expressly stated to be the law that "if the intention of the parties to pass the property, *whether absolute or special*, in certain ascertained chattels is established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier, or ship-master, *employed by the consignor* or a third person, and the chattels are so placed on account of the person who is to have that property, and the depositary assents, it is enough; and it matters not by what documents this is effected: nor is it material whether

the person who is to have the property be a factor or not, for such an agreement may be made with a factor as well as any other individual." The Court, however, drew the *legal inference*, notwithstanding the verdict of the jury, that the oats which had been prepared for shipment on No. 54, for which the master had given a receipt in advance [*311] agreeing to deliver them to the *plaintiff's agent, and of which about three-fourths had actually been put on board before the defendant made his appearance in Longford, *were not received on account of the plaintiff*, and *had not been appropriated to the plaintiff in whole or in part*. In the case of *Aldridge v. Johnson*,¹ as will presently be seen, it was held that where the vendor had filled 155 out of 200 sacks of grain for the vendee, in the vendor's own warehouse, and then emptied them again into the bulk, his election was determined as soon as he had filled each sack, and that the property had passed so far as regarded the 155 sacks. But it is remarkable that in *Bryans v. Nix* there is no suggestion, in the argument or in the decision, that there was any difference in the consignees' rights to the 400 barrels already loaded into the boat and the residue which had not been received by the master in fulfilment of the agreement that he was to deliver them to the plaintiff's agent in Dublin: nor was *Bryans v. Nix* quoted or referred to in *Aldridge v. Johnson*.

§ 416. In *Godts v. Rose*,¹ in 1854, there was a conditional appropriation, which was held not to pass the property, because the vendee had not complied with the condition. The sale was of five tons of oil, "to be free delivered and paid for in fourteen days." The plaintiff, who was the vendor, sent to his wharfinger an order to transfer eleven specified pipes to the purchaser, and took the wharfinger's acknowledgment, addressed to the buyer, that these eleven pipes were transferred to the buyer's name. The plaintiff then sent this acknowledgment to the buyer, by a clerk, who also took an invoice of the oils, and asked for a cheque in pay-

¹ 7 E. & B. 875, and 26 L. J. Q. B. 296.

¹ 17 C. B. 229, and 25 L. J. C. P.

ment. This was refused, on the ground that payment was only to be made in fourteen days. The clerk then demanded that the wharfinger's acknowledgment should be returned to him, and this was refused. The buyer then sent immediately to the wharfinger, and got possession of part of the oil, but before the delivery of the rest, the vendor countermanded his order on the wharfinger.

The *latter, however, thinking that the property [*312] had passed, delivered the whole to the purchaser, against whom the action was then brought in trover. All the judges were of opinion that the property had not passed, because the order for its transfer was conditional on payment, the jury having found as a fact that the plaintiff's clerk did not intend to part with the oil or the transfer order without the cheque, and that he said so at the time.

§ 417. *Aldridge v. Johnson*¹ was decided by the Queen's Bench, in 1857. The plaintiff agreed to take from one Knight one hundred quarters of barley, out of the bulk in Knight's granary, at 2*l.* 3*s.* a quarter, in exchange for thirty-two bullocks, at 6*l.* apiece. The difference to be paid to Knight in cash. The bullocks were delivered. The plaintiff was to send his own sacks, which Knight was to fill, to take to the railway for conveyance to the plaintiff, and to place upon trucks free of charge. Each quarter of barley would fill two sacks, and the plaintiff sent two hundred sacks to be filled, some of them with his name marked on them. Knight filled one hundred and fifty-five of the sacks, leaving in the bulk more than enough to fill the other forty-five sacks, but could not succeed, upon application at the railway, in obtaining trucks for conveying them. The plaintiff afterwards complained to Knight of the delay, and was assured that the barley would be put on the rail that day, but this was not done; and Knight finding himself on the eve of bankruptcy, emptied the barley out of the sacks into the bulk again, so as to make it undistinguishable.² The action was detainue

¹ 7 E. & B. 885, and 26 L. J. Q. B. 296. In a case where sheep were purchased by an oral contract, and were separated from the vendor's flock, the

² *Commingleing of goods after sale.* —

and trover, against the assignees of Knight for the barley and the sacks. *Held*, that the property in the barley, in the one hundred and fifty-five sacks, had passed, but not in the barley which had not been filled into the other forty-five sacks. Campbell C. J. said: "As soon as each sack was filled with barley, *eo instanti* the property in the barley in the sacks vested in plaintiff. I conceive there was here an *a priori* assent; not only was there a sale of barley, but it

was a sale of part of a specific bulk, which the plaintiff [*313] had *seen, and he sends the sacks to be filled out of that bulk, and out of that only could the vendee's sacks be filled. No subsequent assent was necessary, if the sacks were properly filled." His Lordship then showed that there was also a subsequent assent, and added: "Nothing whatever remained to be done by the vendor, for he had actually appropriated a portion of the bulk to the vendee." Erle J. said: "Sometimes the right of ascertainment rests with the vendee, sometimes solely with the vendor. In the present case the *election rested with Knight alone*: he had to fill the sacks, which were to be sent to

purchaser's mark put upon them, and the sheep placed in a separate inclosure, but no part of the purchase money was paid, and no further acts were done, and a short time afterwards they were turned again with the flock, it was held that there was not a sufficient delivery of the sheep to take the sale out of the Statute of Frauds. *Rappleye v. Adey*, 1 T. & C. (N. Y.) 126. See *Groff v. Belche*, 62 Mo. 400; *Kaufmann v. Schilling*, 58 Mo. 218; *Ropes v. Lane*, 91 Mass. (9 Allen) 509; *Ryder v. Hathaway*, 38 Mass. (21 Pick.) 305; *Mason v. Thompson*, 35 Mass. (18 Pick.) 306; *Inglebright v. Hammond*, 19 Ohio, 337; *Henderson v. Lauck*, 21 Pa. St. 359; *Bond v. Greenwald*, 4 Heisk. (Tenn.) 453; *Butters v. Stanley*, 21 Up. Can. C. P. 402.

Appropriation.—The question of appropriation is practicably difficult to ascertain, when the evidence is

meagre or equivocal, and the real intention of the parties at the time cannot therefore be ascertained, in such case it is always a question of fact for the jury under proper instructions, and must be submitted to them, unless it is plain that as a matter of law the evidence will justify a verdict but one way. *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295. See *Stevens v. Boston & W. R. R. Corp.*, 74 Mass. (8 Gray) 262; *Coggill v. Hartford & N. H. R. R. Co.*, 69 Mass. (3 Gray) 545; *Stanton v. Eager*, 33 Mass. (16 Pick.) 473; *Allen v. Williams*, 29 Mass. (12 Pick.) 297; *Moakes v. Nicolson*, 19 C. B. (N. S.) 290; *Godts v. Rose*, 17 C. B. 229; *Tregelles v. Sewell*, 7 Hurl. & N. 574. See, also, *Leney v. Taplin*, 21 L. T. N. S. 204, 207; *Marshall v. Jamieson*, 42 Up. Can. Q. B. 115, 119.

him for that purpose by the vendee, and *as soon as he had done an outward act, indicating his election*, viz., by filling the sacks, and directing them to be sent to the railway, *the property passed*."

The decision in *Aldridge v. Johnson* was followed by the Exchequer of Pleas, in 1857, in *Langton v. Higgins*³ (*ante*, p. 275).

§ 418. In 1863, *Campbell v. The Mersey Docks*¹ was decided in the Common Pleas. A cargo of cotton, ex Bosphorus, consisting of five hundred bales, arrived in the defendants' docks in September, 1862. The plaintiff was the broker for them, and had himself bought two hundred and fifty bales, and sold the remainder to other parties. All had one mark, but the numbers were only affixed by the defendants when the bales were landed and weighed. On the 13th of September, a certificate or warehouse warrant was sent to the plaintiff for two hundred and fifty bales, "numbered from 1 to 250, entered by J. P. Campbell, on the 10th of September, 1862; rent payable from the 15th of September." The plaintiff thereupon paid for the two hundred and fifty bales, getting the warrant endorsed to him with a delivery order, "for the above-mentioned goods," dated the 15th of September. On the 7th of October, the plaintiff resold the cotton, and sent the warrant, endorsed by him, with a delivery order for the cotton therein mentioned. The buyer repudiated the contract, on the ground that the cotton was not equal to the *samples. The [*314] plaintiff then demanded back the warrant, and was told by the defendants, for the first time, that two hundred of the bales, numbered from 1 to 250, had been inadvertently delivered on the 11th and 13th of September to other persons. They offered him a fresh warrant for other numbers. He declined, and brought suit for the value of the two hundred and fifty bales. On the trial, the defendants insisted that the appropriation by the company, of the two hundred and fifty bales, out of the larger number, was not sufficient

³ 4 H. & N. 402, and 28 L. J. Ex. 252.

¹ 14 C. B. N. S. 412.

to vest the property in those specific bales in the plaintiff, without his assent, and Keating J. sustained this view. One of the jury then asked his Lordship if the plaintiff's indorsement of the warrant (on the re-sale) did not amount to such assent, and the learned judge said, it was not conclusive, but that it was open to the company to show that the appropriation was a mistake on the part of one of their clerks. The verdict was for the defendants, and the Court refused to order a new trial. Erle C. J. said: "There certainly was some evidence of appropriation, and the question left to the jury upon that was, whether the evidence of that appropriation did not arise from a mistake on the part of the company's clerk. The learned judge is not dissatisfied with the finding of the jury upon that question." Willes J. also said: "The real question was whether the appropriation of Nos. 1 to 250 was not a mistake. The jury found that it was. No property in the goods, therefore, ever vested in the plaintiff." But both the learned judges expressed an extra-judicial opinion upon a point, confessedly "not material," to which attention must be directed. Erle J. said: "It has been established by a long series of cases, of which it will be enough to refer to *Hanson v. Meyer*, 6 East, 614; *Rugg v. Minett*, 11 East, 210; and *Rohde v. Thwaites*, 6 B. & C. 688, that the purchaser of an *unascertained portion of a larger bulk acquires no property in any part until there has been a separation and an appropriation assented to both by vendor and vendee. Nothing passes until there has been an assent, express or implied, on the part of the vendee.*"

[*815] Willes J. assented to this statement * of the law, and said: "Perhaps the case of *Godts v. Rose*, 17 C. B. 229, is even more in point to show that there must not only be an appropriation, but an appropriation assented to by the vendee. The assent of the vendee may be given prior to the appropriation by the vendor; it may be either express or implied, and it may be given by an agent of the party, by the warehouseman or wharfinger, for instance."

Care must be taken not to misconceive the true sense of these *dicta*. They do not mean that a *subsequent* assent by the buyer to the appropriation made by the vendor is neces-

sary. Willes J. states this plainly, and Erle J. says that there must be an assent of the vendee express or implied. This assent is implied, as shown by the language of Erle J. himself in *Aldridge v. Johnson*, and in several of the cases already quoted, where by the terms of the contract the vendor is vested with an implied authority to select the goods, and has determined an election by doing some act which the contract obliged him to do, and which he could not do till an appropriation was made. That this is the real signification of these *dicta* is also fully shown in the strongly contested case of *Brown v. Hare*,² in which the unanimous decision of the Exchequer Chamber was likewise delivered by Erle J.

§ 419. In this case the defendant, at Bristol, bought from the plaintiffs, merchants at Rotterdam, through their broker, residing at Bristol, "20 tons of best oil, at 47s." The plaintiffs wrote to the broker on the 19th of April that they had secured ten tons for the defendant, deliverable in September, and the defendant wrote back "send them by next steamer." The oil was to be shipped "free on board." On the 7th of September the plaintiffs from Rotterdam wrote to the broker to inform the defendant, which he did, that they had shipped "five tons of rape oil for defendant," and on the 8th they forwarded the invoices and bill of lading. The bill of lading was for delivery to the plaintiffs' "order or assigns," and was endorsed by them on the 8th of September, "Deliver the *goods to the order of Hare & Co." [*316] (the defendants). The invoices specified the casks by marks and numbers; and the bill of lading also identified them in the same way. The letter to the broker containing the invoices and bill of lading thus endorsed reached him on the 10th, after business hours, and on the 11th he sent them to the defendant. The ship was actually lost before the documents were received by the broker, and he knew it, but the defendant did not hear of the loss till about two hours after receiving the bill of lading, and he then imme-

² 3 H. & N. 484, and 27 L. J. Ex. 372; afterwards in Ex. Ch. 4 H. & N. 822, and 29 L. J. Ex. 6.

diately returned it to the broker. Bramwell B. dissented from the majority of the Court, thinking that there had been no appropriation to pass the property, but Pollock C. B. delivered the judgment, holding that the property had passed, and that the buyer must bear the loss; on the ground, *first*, that the contract to deliver "free on the board" meant that it was to be for account of the defendant as soon as delivered on board;¹ *secondly*, that taking the bill of lading to the shippers' own order, and then endorsing it to the defendant, was precisely the same in effect as taking the bill of lading to the order of the defendant; *thirdly*, that the bill of lading having been forwarded to the broker only that he might get the defendant's acceptance on handing it over, as provided in the contract, this did not prevent the property from passing, the goods represented by the bill of lading being in the same legal state as if in a warehouse, subject to the purchaser's order, but not to be taken by him without payment of the price.

§ 420. In error to Exchequer Chamber, this judgment was unanimously affirmed, the Court consisting of Erle, Williams, Crompton, Crowder, and Willes, JJ. Erle J. in giving the opinion, said, that — "The contract was for the purchase of unascertained goods, and the question has been, when the property passed. For the answer the contract

¹ *Delivery "free on board."* — Where the contract is for delivery "free on board" of a vessel, or the cars, the title, and consequently the risk, passes by such delivery of goods, originally unascertained, notwithstanding the fact, the bill of lading to be taken to the consignor's order and then indorsed over to his agent. *Browne v. Hare*, 3 Hurl. & N. 484; s. c. 4 Hurl. & N. 822; *Langd. Lead. Cas. on Sales*, 976, 989. Where the contract is for delivery "free on board," payment to be made "cash on delivery," such delivery is not a condition precedent to the passing of the title, although the goods at the time were not specified, but were to be

afterwards separated from the bulk. See *Bloxam v. Sanders*, 4 Barn. & Cres. 941; *Butters v. Stanley*, 21 Up. Can. C. P. 402; *Coleman v. McDermott*, 5 Up. Can. C. P. 313; *Marshall v. Jamieson*, 42 Up. Can. Q. B. 118; *Clark v. Rose*, 29 Up. Can. Q. B. 168, 302; *George v. Glass*, 14 Up. Can. Q. B. 514; *Howland v. Brown*, 13 Up. Can. Q. B. 199; *Wilmot v. Wadsworth*, 10 Up. Can. Q. B. 501. But see *Brandt v. Bowlby*, 2 Barn. & Ad. 932; *Ruck v. Hatfield*, 5 Barn. & Ald. 632; *Godts v. Rose*, 17 C. B. 229; *Wait v. Baker*, 2 Ex. 1; *Craven v. Ryder*, 6 Taunt. 434; s. c. 2 Marsh. 127; *Shepherd v. Harrison*, L. R. 5 H. & L. 116.

must be resorted to, and under that we think *the property passed when the goods were placed free on board in performance of the contract*. In this class of contracts the property may depend, according to the contract, either on mutual consent of both parties, or on the act of the vendor communicated * to the purchaser, *or on the act of the* [*317] *vendor alone*. If the bill of lading had made the goods to be delivered 'to the order of the consignee,' the passing of the property would be clear. The bill of lading made them 'to be delivered to the order of the consignor,' and he indorsed it to the order of the consignee, and sent it to his agent for the consignee. Thus, the real question has been on the intention with which the bill of lading was taken in this form, whether the consignor shipped the goods in performance of his contract to place them free on board, or for the purpose of retaining control over them and continuing owner contrary to the contract. The question was one of fact, and must be taken to have been disposed of at the trial; the only question before the Court below or before us being, whether the mode of taking the bill of lading necessarily prevented the property from passing. In our opinion, it did not, under the circumstances."¹

§ 421. In *Tregelles v. Sewell*,¹ in 1863, both buyer and seller were residents of London, and the contract was made there. The purchaser bought "300 tons Old Bridge rails, at 5*l.* 14*s.* 6*d.* per ton delivered at Harburg, cost, freight, and insurance: payment by net cash in London, less freight, upon handing bill of lading and policy of insurance. A dock company's weight note, or captain's signature for weight, to be taken by buyers as a voucher for the quantity shipped." *Held*, by all the judges in the Exchequer, and afterwards in the Ex. Ch., that by the true construction of this sale the seller was not bound to make delivery of the

¹ And see *Ogg v. Shuter*, as reported in the Court of Common Pleas, L. R. 10 C. P. 159. The decision was reversed on appeal, 1 C. P. D. 47, C. A., and is fully considered, *post*, p. 347. See further on this sub-

ject, *Ogg v. Shuter*, L. R. 10 C. P. 159; s. c. reversed on appeal L. R. 1 C. P. Div. 47; *Browne v. Hare*, 3 Hurl. & N. 484; s. c. 4 Hurl. & N. 822; 27 L. J. Ex. 372; 29 L. J. Ex. 6. ¹ 7 H. & N. 571.

goods at Harburg, but only to ship them for Harburg at his own cost, free of any charge against the purchaser, and that the property passed as soon as the seller handed the bill of lading and policy of insurance to the purchaser.

§ 422. The difficulty that sometimes exists in construing contracts involving the subject now under consideration, could hardly be illustrated by a more striking example [*318] ample than * the recent case of *The Calcutta Company v. De Mattos*,¹ argued by very eminent counsel in the Queen's Bench in Michaelmas Term, 1862, and held under advisement till the 4th of July, 1863, when the judges were equally divided in opinion; Cockburn C. J. and Wightman J. differing from Blackburn and Mellor JJ. When the cause was heard in error in the Exchequer Chamber,² the diversity of opinion was still more marked, for while three judges (Erle C. J., Willes J., and Channell B.) concurred in opinion with Blackburn and Mellor JJ., and one judge (Williams J.) agreed with Cockburn C. J. and Wightman J., two other judges (Martin and Pigot BB.) differed from both.

§ 423. The facts were these. On the 1st of May, 1860, defendant wrote to the company, proposing to supply them with "1000 tons of any of the first-class steam-coals on the Admiralty list, at my option, delivered over the ship's side at Rangoon at 45s. per ton of 20 cwt., the same to be shipped within three months of the date of acceptance of this offer. Payment of one-half of each invoice value in cash, on handing you bills of lading and policy of insurance to cover the amount, and balance by like payment on delivery," &c., &c.

The reply of the 4th of May accepted the tender with the following modifications and additions: "The selection of the particular description to be at the company's option . . . half the quantity, say not less than 500 tons, to be shipped not later than 10th June prox., and the remainder in all that month . . . payment one half of each invoice value by bill at three months on handing bills of lading and policy

¹ 32 L. J. Q. B. 322.

² 33 L. J. Q. B. 214, in Ex. Ch.

of insurance to cover the amount, or in cash under discount at the rate of 5l. per centum per annum, at your option, and the balance in cash at the current rate of exchange at Rangoon." The contract was closed upon these conditions, and defendant in performance of it chartered the ship Waban for Rangoon, the company being no party to the charter, and loaded her with 1166 tons of coal, taking a bill of lading which expressed that the coal was *shipped [*319] by him, and was to be delivered at Rangoon to the agent of the company or to his assigns, freight to be paid by the charterer as per charter-party. The charter-party stipulated that the freight was "to be paid in London on unloading and right delivery of the cargo at 40s. per ton on the quantity delivered . . . one quarter by freighter's acceptance at three months, and one quarter by like acceptance at six months from the final sailing of the vessel from her last port in the United Kingdom, the same to be returned if the cargo be not delivered at the port of destination; and the remainder by a bill at three months from the date of the delivery at the freighter's office in London of the certificate of the right delivery of the cargo."

The defendant also effected insurance for 1400l. and handed the bill of lading and policy to the company, in pursuance of the contract, together with the letter: "5th of July, 1860. Herewith I hand you Ocean Marine policy for 1400l. for this ship, as collateral security against the amount payable by you on account of the invoice order, say 1311l. 15s., receipt of which please own." The answer acknowledged the receipt of the policy "to be held as collateral security for the payment to you of 1311l. 15s. on account of the invoice of that shipment."

The invoice value of the coals was 2623l. 10s., of which the company paid half to defendant on the 5th of July, and the vessel sailed on the 8th, but never arrived at her destination, nor were the coals delivered in conformity with the contract.

§ 424. On these facts it became necessary to decide what was the effect of the contract on the property in the goods,

and the right to the price from the time of the handing over the shipping documents and paying half the invoice value.

The opinion of Blackburn J. was the basis of the final judgment, and was approved by the majority of the judges. It is so instructive on the whole subject, as to justify copious extracts. The learned judge said: "There is no rule of law to prevent the parties in cases like the present from making whatever bargain they please. If they use [*320] * words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them on the terms that when shipped they shall be the consignee's property and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual. Such is the common case where goods are ordered to be sent by a carrier to a port of destination. The vendor's duty is in such cases at an end when he has delivered the goods to the carrier, and if the goods perish in the carrier's hands, the vendor is discharged and the purchaser is bound to pay him the price. See *Dunlop v. Lambert* (6 Cl. & Fin. 600). If the parties intend that the vendor shall not merely deliver the goods to the carrier, but also undertake that they shall actually be delivered at their destination, and express such intention, this also is effectual. In such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of the breach of the vendor's contract to deliver at the place of destination. See *Dunlop v. Lambert*. But the parties may intend an intermediate state of things; they may intend that the vendor shall deliver the goods to the carrier, and that when he has done so he shall have fulfilled his undertaking, so that he shall not be liable in damages for a breach of contract, if the goods do not reach their destination, and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive. They may bargain that the property shall vest in the purchaser as owner as soon as the goods are shipped, that then they shall be both

sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving, just as they might, if they pleased, contract that the price should not be payable unless a particular tree fell, but without any contract on the vendor's part in the one case to procure the goods to arrive, or in the other to cause the tree to fall." Referring to the terms of the contract under consideration, the learned judge proceeded to remark:

"It is clear that the coals are to be shipped in * this country, on board a vessel to be engaged by [*321] De Mattos, to be insured, and the policy of insurance and the bill of lading and invoice to be handed over to the company. As soon as Mattos, in pursuance of these stipulations, gave the company the policy and bill of lading, he *irrevocably appropriated to this contract* the goods which were thus shipped, insured, and put under the control of the company. After this he could never have been required nor would he have had the right to ship another cargo for the company; so that from that time, what had originally been an agreement to supply *any* coals answering the description, became an agreement relating to those coals only, just as much as if the coals had been specified from the first.

. . . In construing this contract, the *prima facie* construction is that the parties intended that the *property in the coals vested in the company*, and the right to the price in De Mattos, *as soon as it came to relate to specific ascertained goods*, that is, on the handing over of the documents, and the inquiry must be whether there is any sufficient indication in the contract of a contrary intention. As to one-half of the price, the intention that it should only be paid 'on completion of the delivery at Rangoon,' seems to me as clearly declared as words could possibly declare it, and consequently I think as to that half of the price no right vested in De Mattos unless and until there was a complete delivery at Rangoon. But consistently with this there might be an intention that there should be a complete vesting of the property in the goods in the company, and a complete vesting of the right to the half of the price in De Mattos, so as in effect to make the goods be at the risk of the company, though

half the price was at the risk of De Mattos; so that *the goods were sold and delivered*, though the payment of half the price was contingent on the delivery at Rangoon, and this I think is the true legal construction of the contract."

Wightman J. was of opinion that on the true construction of the contract, *the whole cargo remained the property of the vendor, and at his risk*: that he was bound to deliver the whole at Rangoon, and that the transfer of the policy and bill of lading to the company was a security to protect the company *in recovering back their advance of one half the price in the event of De Mattos's failure to make delivery at Rangoon.

Cockburn C. J. thought that the *property in the coals passed to the company*, subject to the vendor's lien, for the payment of the price; that the coals, when shipped, were *specifically appropriated* to the company, and that by the transfer of the bill of lading they obtained dominion of the cargo, and could have disposed of it at their pleasure. But that De Mattos remained bound to make delivery in Ragoon, and by breach of that contract was bound to return the half of the price already paid, and to lose his claim for the remainder.

In the Exchequer Chamber, Erle C. J. expressed his concurrence with the opinion of Blackburn J. as to the true meaning and effect of the contract, and Willes J. and Channell B. did the same. Williams J. merely expressed his assent to the views of Cockburn C. J.

Martin B. gave his view of the true intention of the parties, without declaring whether and when, if at all, the property passed, but remarked: "I cannot say that I agree with my brother Blackburn's judgment:" and Piggott B. expressed his concurrence with the interpretation of the contract by Martin B.

§ 425. In *Jenner v. Smith*,¹ where the sale was made by sample, and was of two pockets of hops out of three that were lying at a specified warehouse, the vendor instructed the warehouseman to set apart two out of the three pockets

¹ L. R. 4 C. P. 270.

for the purchaser, and the warehouseman thereupon placed on two of them a "wait-order card," that is a card on which was written, "to wait orders," and the name of the vendee: but no alteration was made in the warehouseman's books, and the vendor remained liable for the storage. The vendor then sent an invoice with the numbers and weights to the buyer of these two pockets, with a note at the foot, "The two pockets are lying to your order." *Held*, that the property had not passed, because the buyer had not made the vendor his agent for appropriating the goods to the contract, * nor abandoned his right of comparing the [*323] bulk with the sample, or of verifying the weight. There was neither previous authority nor subsequent assent to the appropriation.

In *Ex parte Pearson*,² the purchaser had ordered and paid for the goods, and the company loaded the goods on a railway to his address, and sent him the invoice *after* the presentation of a petition for winding up the company, but *before* order made, and it was held that the property had passed to the purchaser and could not be taken by the official liquidator as assets of the company.

§ 426. Before leaving this branch of the subject, it is well to notice that the property does not pass even when the vendor has the power to elect, unless he exercise it in conformity with the contract. He cannot send a larger quantity of goods than those ordered, and throw the selection on the purchaser.¹ Thus in *Cunliffe v. Harrison*,² it was *held*

² 3 Ch. 443.

¹ *Sending larger quantity than ordered.* — Where more goods are sent than were ordered the purchaser may repudiate the whole contract (*Rommel v. Wingate*, 103 Mass. 327; *Clark v. Baker*, 52 Mass. (11 Metc.) 186; s. c. 45 Am. Dec. 199; *Corninger v. Crocker*, 62 N. Y. 151; *Downer v. Thompson*, 2 Hill (N. Y.) 137; *Levy v. Green*, 1 El. & El. 969; s. c. 27 L. J. Q. B. 111; *Cunliffe v. Harrison*, 6 Ex. 903; *Isherwood v. Whitmore*, 11 Mees. & W. 347; *Langd. Lead. Cas. on Sales*,

844); and should he accept, he will be liable to pay only for that which he ordered. It is held in *Iron Cliff Co. v. Buhl*, 42 Mich. 86, that where ore is piled at the point of delivery in a mass larger than was contracted for, and nothing remained to be done other than to take the contract quantity from the pile, this will constitute a sufficient delivery. See further on this subject, *Smith v. Friend*, 15 Cal. 124; *Bean v. Howe*, 85 Pa. St. 260; *Hutchinson v. Commonwealth*, 82 Pa. 472. It was held in *Eaton v. Gay*, 44

that where an order was given for ten hogsheads of claret, and the vendor sent fifteen, the action for goods sold and delivered would not lie against the purchaser (who refused to keep any of the hogsheads), on the ground that no specific hogsheads had been appropriated to the contract, and thus no property had passed. And in *Levy v. Green*,³ the goods sent in excess of those ordered were articles entirely different, but packed in the same crate: the order being for certain earthenware teapots, dishes, and jugs, to which the plaintiff had added other earthenware articles of various patterns not ordered. In the Court below,⁴ there was an equal division of the judges, Lord Campbell and Wightman J. holding that the defendant had a right to reject the whole on account of the articles sent in excess, and Coleridge and Erle JJ. being of a different opinion; but in the Exchequer Chamber, Martin, Bramwell, and Watson, BB., and Willes and Byles JJ., were unanimous in holding with

Lord Campbell, and Wightman J., that the property [*324] had *not passed, and that the purchaser had the right to reject the whole.⁵

§ 427. [In *Gath v. Lees*,¹ the defendants agreed to buy from the plaintiff cotton "to be delivered at seller's option in August or September, 1864, payment within ten days from date of invoice." The plaintiff afterwards gave notice to the defendants that the cotton was ready for delivery on a certain day in August, and that the invoice would be dated

Mich. 431; s. c. 38 Am. Rep. 276, that where a man orders a club supper, and agrees on the bill of fare and the price for each guest, he has a right to expect that the printed bill of fare will be limited accordingly, and he is not liable for any extras that may be called for or supplied to the guests, and that he is not bound to give any notice that he will not be liable.

² 6 Ex. 903. See, also, *Hart v. Mills*, 15 M. & W. 85, and *Dixon v. Fletcher*, 3 M. & W. 145.

³ 1 E. & E. 969, and 28 L. J. Q. B.

319; *Tarling v. O'Riordan*, 2 L. R. Ir. 82, C. A.

⁴ 27 L. J. Q. B. 111.

⁵ *Election by vendor*. — The election by the vendor must correspond with the contract, or there can be no perfect sale and no binding appropriation of specific goods to the contract. 2 Schouler on Pers. Prop. sec. 263. See, also, *Rommel v. Wingate*, 103 Mass. 327; *Hill v. Heller*, 27 Hun (N. Y.) 416; *Barrowman v. Free*, L. R. 4 Q. B. Div. 500; *Tarling v. O'Riordan*, 2 L. R. Ir. 82; *Shannon v. Barlow*, 9 Ir. Jur. N. S. 229.

¹ 3 H. & C. 558.

from that day. And it was held that the plaintiff, having exercised his option, was bound to deliver the cotton in August; and that the non-delivery in that month was a good equitable defence to an action against the defendant for not accepting the cotton. Martin B. saying during the course of the argument:—"The seller could not give two notices. When the notice was given, *the buyer was bound to be ready with the money, which he might have had difficulty in getting*; then is the seller to say, 'I will not deliver the cotton according to my notice, but will put you off until next month.'"²

§ 428. But an appropriation and tender of goods, not in accordance with the contract, and in consequence rejected by the purchaser, does not prevent the vendor from afterwards, within the time limited for so doing, appropriating and tendering other goods which are in accordance with the contract.

This was decided in *Borrowman v. Free*,¹ where the plaintiffs, being bound by contract to tender a cargo of maize to the defendants, tendered a cargo which was rejected by the defendants, as not being in accordance with the contract, and afterwards and within the time limited for so doing the plaintiffs tendered a cargo which was in accordance with the contract, and it was held, that this second tender was good, and that the defendants were bound to accept it. *Gath v. Lees* was distinguished upon the grounds that there the seller's option was exercised in a proper manner, and that the purchasers, acting upon the vendor's notice,

² Where plaintiff delivered wheat to the proprietor of an elevator, receiving a plain receipt therefor, and afterwards the proprietor became insolvent and plaintiff thereupon tendered storage and insurance, and made demand, *held*, in an action of replevin, that parol evidence was admissible to show whether the contract was intended as a sale or bailment. And evidence was properly submitted to the jury of the usage of the business, and they were properly in-

structed that the contract was not a bailment unless the bailor retained from the beginning the right to elect whether he would demand the redelivery of his property or other of like quality and grade, but if he surrendered to the other the right of election, it would be considered a sale, with the option on the part of purchaser to pay either in money or property. *Lyon v. Lenon*, 106 Ind. 567; s. c. 4 West. Rep. 461.

¹ 4 Q. B. D. 500, C. A.

had altered their position for the worse. Brett L. J. observes,² "I have only to add that a different rule [*325] might *have been applied *if the defendants had accepted the cargo of the Charles Platt* (the cargo which had been first tendered). It is possible that the tender of the plaintiffs could not in that case have been withdrawn. I wish it, however, to be understood that this is a point upon which I express no opinion."]

§ 429. The decisions as to subsequent appropriation in cases where the agreement was for the delivery of a chattel to be manufactured begin with *Mucklow v. Mangles*,¹ in 1808. Pocock ordered a barge from one Royland, a barge-builder, and advanced him some money on account, and paid more as the work proceeded, to the whole value of the barge. When nearly finished, Pocock's name was painted on the stern, but by whom and under what circumstances is not stated in the report. The barge was finished and seized on execution against Royland two days *afterwards*, but before he had delivered it up to Pocock, and the sheriff's officer delivered it to Pocock under an indemnity. Royland had committed an act of bankruptcy *before* the barge was finished, and the action was trover by his assignees against the sheriff's officer. *Held*, that the property had not passed, Heath J. saying: "A tradesman often finishes goods which he is making in pursuance of an order given by one person, and sells them to another. If the first customer has other goods made for him within the stipulated time, he has no right to complain; he could not bring trover against the purchaser of the goods so sold."

§ 430. In *Bishop v. Crawshay*,¹ it was held by the Queen's Bench, in 1824, that no property passed to the defendant in goods which he had ordered from a manufacturer in the country, and on account of which he had accepted a bill of exchange for 400*l*. The manufacturer had received the order on the 26th of January, had committed an act of bank-

² At page 505.

¹ 3 B. & C. 415.

¹ 1 Taunt. 348.

ruptcy, not known to the defendant on the 5th of February, and on the 6th drew the above mentioned bill of exchange. On the 8th the goods were completed and loaded on barges to be forwarded to the defendant, and on the 15th a commission issued against the bankrupt, by whose assignees the *action of trover was brought. Hol- [*326] royd J. said: "The goods were made, but until the money paid was appropriated to these particular goods the defendant could not have maintained trover for them, if they had been even sold to another person."²

§ 431. In *Atkinson v. Bell*,¹ already fully explained (*ante*, p. 92), the purchaser had ordered the machines; they had been made and packed under his agent's superintendence, and the boxes made ready to be sent, and the vendor had written to ask the purchaser by what conveyance they were to be sent, but had received no answer, when he became bankrupt. His assignees then brought an action against the purchaser (who refused to take the goods) for goods *bar-*

² *Appropriation of seller.* — It is sometimes difficult to determine when appropriation is completed in those cases where the subsequent acts of appropriation are to be performed by the seller and not by the buyer. 2 Schouler on Pers. Prop. sec. 260. It is a general doctrine that where the vendor is to make the appropriation, the title vests and the sale is completed as soon as the act is done by him identifying the property. *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295; *Dunning v. Gordon*, 4 Up. Can. Q. B. 399. And it is also held that discounting bills of exchange attached to bills of lading that this will constitute an appropriation of the goods mentioned in the bills of lading. *Bondurant v. Owens*, 4 Bush (Ky.) 662; *Holmes v. Bailey*, 92 Pa. St. 57; *Holmes v. German Security Bank*, 87 Pa. St. 525; *First Nat. Bank of Memphis v. Pettit*, 9 Heisk. (Tenn.) 447; *First Nat. Bank v. Bensley*, 9 Biss. C. C. 378.

¹ 8 B. & C. 277.

Contract for the construction of an article. — Where the plaintiff in performance of an agreement with the defendant, furnished materials and constructed a carriage in accordance with his direction, for which a stipulated price was to be paid, and the defendant refused to receive and pay for it when completed and tendered, it was held that the plaintiff was entitled to recover the contract price and interest from the time the money should have been paid. *Shawhan v. Van Nest*, 25 Ohio St. 490; s. c. 18 Am. Rep. 313. See *Allen v. Jarvis*, 20 Conn. 50; *Moody v. Brown*, 34 Me. 107; s. c. 56 Am. Dec. 640; *Hague v. Porter*, 3 Hill (N. Y.) 141; *Downer v. Thompson*, 2 Hill (N. Y.) 137; *Bement v. Smith*, 15 Wend. (N. Y.) 493; *Ballentine v. Robinson*, 46 Pa. St. 177; *Girard v. Taggart*, 5 Serg. & R. (Pa.) 19; s. c. 9 Am. Dec. 327; *Clarke v. Spence*, 4 Ad. & E. 448; *Boeswell v. Kilborn*, 15 Moo. P. C. C. 309. *Contra*, *Gillet v. Hill*, 2 C. & M. 535.

gained and sold, this form of action not being maintainable where the property has not passed. *Held*, that the form of action was misconceived; it should have been for not accepting the goods: the property had not passed, for although the vendor *intended* them for the purchaser, his right to revoke that intention still existed, and he might have sold the goods to another at any time before the buyer assented to the appropriation.² This is perhaps the strongest case in the books on this subject, for the conduct of the vendor was as near an approximation to a determination of election, without actually becoming so, as one can well conceive. It is distinguishable from *Fragano v. Long*³ only on the ground that in this latter case the order was to *despatch* the goods for the buyer's account, and when the goods were despatched it was really the act of the buyer through his agent the seller, and this act of the buyer constituted an implied assent to the appropriation made by the seller, which then became no longer revocable. In *Atkinson v. Bell* this element was deficient. But there was another circumstance in that case, adverted to in the judgment of the Court, which renders it almost impossible to distinguish it from *Rohde v. Thwaites*.⁴ The defendant had made Kay his agent to *procure the machines*; and the report states that they were altered [*327] so as *to suit Kay, and then packed up by *Kay's directions*, which is equivalent to their being packed up by the buyer's own directions; and surely if the buyer after goods have been completed on his order, is informed by the seller that they are ready for him, and then examines

² *Assent to appropriation*.—Where the seller is to select and set apart the goods and notify the buyer, the title passes when the buyer assents to the appropriation, if not before. *Rohde v. Thwaites*, 6 Barn. & Cr. 388; *Wilkins v. Bromhead*, 6 Man. & Gr. 963; *Langd. Cas. on Sales*, 133, 140, 838; 2 *Schouler on Pers. Prop.* sec. 261. See, also, *Gooderham v. Dash*, 9 Up. Can. C. P. 413; *Coleman v. McDermot*, 5 Up. Can. C. P. 303; *Gowans v. Consolidated Bank of Canada*, 43 Up. Can. Q. B. 318; *O'Neil v.*

McIlmoyle, 34 Up. Can. Q. B. 236; *Robertson v. Strickland*, 28 Up. Can. Q. B. 221; *Bank of Upper Canada v. Killaly*, 21 Up. Can. Q. B. 9.

Implied acceptance.—The acceptance of the vendee may be express or implied, and may be given in person or by his agent. See *Jenner v. Smith*, L. R. 4 C. P. 270; *Campbell v. Mersey Docks*, 14 C. B. N. S. 412; *Langd. Lead. Cas. on Sales*, 873, 875, 877, 882.

³ 4 B. & C. 291.

⁴ 6 B. & C. 388.

and directs them to be packed up for him, this constitutes as strong an assent to the appropriation as was given by the purchaser in *Rohde v. Thwaites*, when he said, without seeing the sugar that had been packed up for him, that he would send for it. Many attempts have been made to reconcile *Atkinson v. Bell* with the principles recognized in the other cases on the subject, but it is very difficult to avoid the conclusion that a conflict really exists, and that if correctly reported, the case would not *on this particular point* be now decided as it was in 1828.

§ 432. In *Elliott v. Pybus*,¹ in 1834, a machine was ordered by defendant, and he deposited with plaintiff 4*l.* on account of the price. When completed, he saw it, paid 2*l.* more on account, but made no final settlement. In reply to a demand for 10*l.* 19*s.* 8*d.*, the balance of the account, defendant admitted that the machine was made according to his order, and asked plaintiff to send it to him before it was paid for. This was *held* an assent to the appropriation, and a count for goods bargained and sold was maintained.

The cases in relation to the appropriation of an unfinished chattel, paid for by instalments during the progress of the work, have already been examined in Chapter III. of this Book, pp. 278 *et seq.*

¹ 10 Bing. 512.

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*CHAPTER VI.

RESERVATION OF THE JUS DISPONENDI.

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§ 433. It has already been shown that the rules for determining whether the property in goods has passed from vendor to purchaser, are general rules of *construction* adopted for the purpose of ascertaining the real intention of the parties, when they have failed to express it. Such rules from their very nature cannot be applied to cases where exceptional circumstances repel the presumptions or inferences on which the rules are founded. However definite and complete, therefore, may be the determination of election on the part of the vendor, when the contract has left him the choice of appropriation, the property will not pass if his acts show clearly his purpose to retain the ownership, notwithstanding such appropriation.

§ 434. The cases which illustrate this proposition arise chiefly where the parties live at a distance from each other, where they contract by correspondence, and where the vendor is desirous of securing himself against the insolvency or default of the buyer. If A., in New York, orders goods from B. in Liverpool, without sending the money for them, there are two modes usually resorted to, among merchants, by which B. may execute the order without assuming the risk of A.'s inability or refusal to pay for the goods on arrival. B. may take the bill of lading, making the goods deliverable to his own order, or that of his agent in New York, and send it to his agent, with instructions not to transfer it to A. except on payment for the goods. Or B. may not choose

to advance the money in Liverpool, and may draw a bill of exchange for the price of the goods on A., and sell the bill *to a Liverpool banker, transferring to the [*329] banker the bill of lading for the goods, to be delivered to A. on due payment of the bill of exchange. Now in both these modes of doing the business, it is impossible to infer that B. had the least idea of passing the property to A. at the time of appropriating the goods to the contract.¹ So that although he may write to A. and specify the packages and marks by which the goods may be identified, and although he may accompany this with an invoice, stating plainly that these specific goods are shipped for A.'s account, and in accordance with A.'s order, making his election final and determinate, the property in the goods will nevertheless remain in B. or in the banker, as the case may be, till the bill of lading has been endorsed and delivered up to A. These are the most simple forms in which the question is generally presented, but we shall see that in this class of cases as well as in that just discussed, it is often a matter of great nicety to determine whether or not the vendor's purpose or intention was really to reserve a *jus disponendi*.²

¹ See *Security Bank of Minnesota v. Luttgen*, 29 Minn. 363; *Mason v. Great Western Ry. Co.*, 31 Up. Can. Q. B. 78.

² *Reservation of control*. — Where the vendor manifests an intention to retain control over the property, the title will not vest in the vendee. *Wigton v. Bowley*, 130 Mass. 252, 254; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295; *Griffith v. Ingledew*, 6 Serg. & R. (Pa.) 429; s. c. 9 Am. Dec. 444; *Hobart v. Littlefield*, 13 R. I. 341, 346; *Brandt v. Bowlby*, 2 Barn. & Ad. 932; *Langd. Cas. on Sales*, 825, 929. But a delivery by the vendee to a common carrier or on board a vessel belonging to the purchaser or chartered by him, will vest the title in such purchaser, unless the fact of the shipment is restrained by the terms of the bill of lading. *Mirabita v. Imperial Otto-*

man Bank, L. R. 3 Ex. Div. 164, 172; s. c. 31 Moak's Eng. Rep. 201, 208. Where the vendor takes the bill of lading or the carrier's receipt in his own or some agent's name, or takes the bill of lading to his own order, the title will not vest in the vendee. *Wigton v. Bowley*, 130 Mass. 252, 254; *First National Bank v. Crocker*, 111 Mass. 163, 167; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295; *Farmers' & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568, 578; *Griffith v. Ingledew*, 6 Serg. & R. (Pa.) 429; s. c. 9 Am. Dec. 444; *Hobart v. Littlefield*, 13 R. I. 341, 346; *Gabarron v. Kreeft*, L. R. 10 Ex. 274; *Mirabita v. Imperial Ottoman Bank*, L. R. 3 Ex. Div. 164; s. c. 31 Moak's Eng. Rep. 207, 208; *Ellershaw v. Magniac*, 6 Ex. 570; *Wait v. Baker*, 2 Ex. 1; *Langd. Cas. on Sales*, 835, 842. The same is true where the

§ 435. In *Walley v. Montgomery*,¹ the plaintiff had ordered a cargo of timber from Schumann and Co., and they informed him by letter that they had chartered a vessel for him, and afterwards sent him in another letter the bill of lading and invoice, advising that they had drawn on him at three months, "for the value of the timber." The invoice was of a cargo of timber, "shipped by order, and for account and risk of Mr. T. Walley, at Liverpool," and the bill of lading was made "to order or assigns, he or they paying freight, &c." Schumann and Co. sent at the same time another bill of lading, with bills of exchange drawn on the plaintiff for the price, to the defendant, who was their agent, and he got the cargo from the captain. The plaintiff applied to the defendant for the cargo, offering to accept the bills of exchange,

vendor sends forward the bill of lading with the bill of exchange attached, and directs that there shall be no delivery until after acceptance or payment of the draft. *Newcomb v. Boston & L. R. R. Co.*, 115 Mass. 230; *Stollenwerck v. Thacher*, 115 Mass. 224; *Seymour v. Newton*, 105 Mass. 272; *Farmers' and Mechanics' Nat. Bank of Buffalo v. Logan*, 74 N. Y. 568; *Ogg v. Shuter*, L. R. 10 C. P. 159; *Schotsmans v. Lancashire & R. Co.*, L. R. 2 Chan. App. 336; *Mitchel v. Ede*, 11 Ad. & E. 888; *Ellershaw v. Magniac*, 6 Ex. 570; *Turner v. Trustees of Liverpool Docks*, 6 Ex. 543; *Jenkyns v. Brown*, 14 Q. B. 490; *Mason v. Great Western Ry. Co.*, 31 Up. Can. Q. B. 73. However, where the goods are shipped for the purpose of completing the contract, the title will vest in the purchaser on payment or tender of the contract price. See *Mirabita v. Imperial Ottoman Bank*, L. R. 3 Ex. Div. 164, 172; s. c. 31 Moak's Eng. Rep. 201, 209. See, also, *Halliday v. Hamilton*, 78 U. S. (11 Wall.) 560; bk. 20, L. ed. 214; *Treadwell v. Anglo-American Packing Co.*, 13 Fed. Rep. 22.

Intention of the vendor. — Where the evidence is meagre or equivocal,

the difficulty in ascertaining the real intention of the vendor at the time is very great. *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295; *Hobart v. Littlefield*, 13 R. I. 341, 346. The question of intention is always one for the jury, under proper instructions, where the evidence will justify the finding but one way. *Forcheimer v. Stewart*, 65 Iowa, 594, 596; *Wigton v. Bowley*, 130 Mass. 252, 254; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 295; *Stevens v. Boston & W. R. R. Co.*, 74 Mass. (8 Gray) 262; *Coggill v. Hartford & N. H. R. R. Co.*, 69 Mass. (3 Gray) 545; *Stanton v. Eager*, 33 Mass. (16 Pick.) 473; *Allen v. Williams*, 29 Mass. (12 Pick.) 297; *Farmers' and Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568; *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 360; s. c. 18 Am. Rep. 299; *Hobart v. Littlefield*, 13 R. I. 341; *Dows v. Nat. Exchange Bank*, 91 U. S. (1 Otto) 618; bk. 23, L. ed. 214; *Moakes v. Nicolson*, 19 C. B. (N. S.) 290; *Godts v. Rose*, 17 C. B. 229; *Tregelles v. Sewell*, 7 Hurls. & N. 574; *Sprague v. King*, 1 Pugs. & B. (N. B.) 241; *The New Brunswick Ry. Co. v. McLoed*, 1 Pugs. & B. (N. B.) 257; *Langd. Cas. on Sales*, 713.

¹ 3 East, 585.

but the latter insisted on immediate payment; and on the plaintiff's refusal, sold the cargo, under direction of Schumann and Co. Trover was brought, and Lord Ellenborough at first nonsuited the plaintiff, who did not prove a tender of the freight, *but afterwards joined the [*330] other judges in setting aside the nonsuit, on the ground that the property passed by the invoice and bill of lading, and that the vendor had lost all rights over the goods, save that of stoppage *in transitu* (as to which, see *post*, Book V. Ch. 5).

§ 436. In *Coxe v. Harden*,¹ the property was held to have passed under somewhat similar circumstances. Oddy and Co., of London, ordered a purchase of flax, from Browne and Co., of Rotterdam, who executed the order, and sent an invoice to Oddy and Co., and a bill of lading, *unendorsed*, by which the goods were made deliverable to Browne and Co., and a letter, stating, "We have drawn on you at two usances in favor of Lucas, Fisher, and Co., &c. We close this account in course." Browne and Co. then sent another bill of lading of the same set to the plaintiff, *endorsed*, for the purpose of securing the amount of their bill upon Oddy and Co. Oddy and Co. transferred their unendorsed bill to the defendant, in payment of an antecedent debt, and the defendant got delivery of the flax on that bill, and sold it, notwithstanding plaintiff's warning and demand for the goods under his endorsed bill. The action was trover, and the Court held, that even assuming the plaintiff to have all the rights of the vendor, he could not succeed, because the property in the goods had passed by the shipment for the buyer's account, and no right remained in the vendor, save that of stoppage *in transitu*. No notice was taken of the vendor's purpose to retain a *jus disponendi*, Lord Ellenborough saying, that *the only thing* which stood between Oddy and Co., and their right to possession, was "the circumstance of the captain's having signed bills of lading in such terms as did not entitle them to call upon him for a delivery under their bill of lading. But that difficulty has been removed, for the captain has

¹ 4 East, 211.

actually delivered the goods to their assigns." It is to be remarked of this case, that the date at which the bill of lading was endorsed by Browne and Co., to the plaintiff, was not shown; that it was perhaps not so endorsed till after [*331] the goods had got into * possession of the defendant, and stress was laid on this by one of the judges. At the same time no one of them adverted to the fact, as having any influence on the decision, although printed in italics in the report, that the endorsed bill of lading was sent to the plaintiff by Browne and Co., expressly "for the purpose of securing the amount of their bill upon Oddy and Co." See *Moakes v. Nicholson*,² and *Brandt v. Bowlby*,³ *infra*.

§ 437. In *Ogle v. Atkinson*,¹ it was again held, that the property had passed, notwithstanding the vendor's attempted reservation of a *jus disponendi*, but the attempt was fraudulent. The plaintiff ordered goods from Smidt and Co., at Riga, in return for wine consigned to them for sale the previous year, and sent his own ship for the goods, which were delivered to the captain, who received them in behalf of plaintiff, and as being plaintiff's own goods, according to the statement of Smidt and Co., themselves. They afterwards obtained from the captain, by fraudulent misrepresentation, bills of lading in blank, for the goods so shipped, and sent them to their agent, with orders to transfer them to a third person, unless plaintiff would accept certain bills of exchange which Smidt and Co. drew in favor of that third person. Held, that the property had passed, by the delivery to the plaintiff's agent, and was not divested nor affected by the subsequent acts of Smidt and Co.²

¹ 34 L. J. C. P. 273; 19 C. B. N. S. 290, *post*, p. 343.

² 2 B. & Ad. 932, *post*, p. 332.

³ 5 Taunt. 759; *Ogle v. Atkinson*, followed in *Gabarron v. Kreeft*, L. R. 10 Ex. 274, 278.

² In *Nelson v. Chicago, &c. R. R. Co.*, 2 Ill. App. 180, it is held that where a factor has made advances or incurred liability on the strength of a consignment, the consignor has no

right by subsequent order to suspend or control the sale, except as to the surplus, which is not necessary for the reimbursement of the advances, and that where the consignment was changed to the cashier of a bank, who had knowledge of the factor's claim, that the bank occupied no better position than the consignor himself.

§ 438. In *Craven v. Ryder*,¹ the vendor maintained his right. The plaintiffs agreed to sell to French and Co. twenty-four hogsheads of sugar, free on board a British ship, two months being the usual credit. They sent it by a lighter, taking a receipt from the ship "for and on account of the plaintiffs," which was proven to be *for the purpose of giving the skipper command of the goods* till exchanged for the bill of lading. French & Co. sold the goods, and the defendant gave a bill of lading for them to the vendee of French and Co. without the plaintiff's privity. French and Co. stopped payment *without paying the price of the [*332] sugar, and plaintiffs claimed it, but the defendant refused to deliver to them on the ground that the bill of lading already signed for it in favor of the buyer from French and Co. had been assigned to another vendee, who had in turn paid for it in good faith. The jury found that the receipt given to the plaintiffs for the sugar was "*restrictive*," and that they had done nothing to alter their right of possession of the goods. The Court *held*, that without regard to the form of the receipt, the plaintiffs had the right "to refrain from delivering the goods, unless under such circumstances as would enable them to recall the goods if they saw occasion," and had exercised that right. This seems to be but another mode of describing what, in more recent cases, is termed a reservation of the *jus disponendi*. *Ruck v. Hatfield*,² on similar facts, was decided in conformity with *Craven v. Ryder*.³

§ 439. In *Brandt v. Bowlby*,¹ the vendor was again successful. The facts were that one Berkeley, of Newcastle, ordered wheat from the plaintiffs, Brandt and Co., of St. Petersburg, through their agent, E. H. Brandt, of London. A dispute arose between Berkeley and E. H. Brandt, and the former countermanded all his orders. In the meantime,

¹ 6 Taunt. 433.

² 5 B. & Ald. 632.

³ The mate's receipts for goods are valueless after the bills of lading have been signed, and the captain is justified in signing bills of lading without requiring the production of

the mate's receipts, if he is satisfied that the goods are on board. See *Hathesing v. Laing*, 17 Eq. 92, at pp. 102, 103; and *Maude and Pollock on Shipping*, pp. 136, 338, ed. 1881.

¹ 2 B. & Ad. 932.

however, the plaintiffs had bought a cargo for him and they put it on board the defendants' ship *Helena*, which Berkeley had chartered, and sent for the wheat. They wrote, requesting Berkeley's approval, and enclosed him "invoice and bill of lading of 770 chests wheat shipped for your account and risk per the *Helena*. . . . An *endorsed* bill of lading we have this day forwarded to Messrs. Harris and Co., of London, at the same time drawing upon them for 673*l.* 15*s.*, and for the balance remaining in our favor, viz., 136*l.* 9*s.* 5*d.*, we value on you, &c., &c." An *unendorsed* bill of lading was enclosed to Berkeley, together with an invoice of "wheat

bought by order and for account of J. Berkeley, Esq., [*333] *Newcastle, and was shipped at his risk to London to the address of R. Harris and Sons there per the *Helena*." The endorsed bill of lading was forwarded by the plaintiffs to E. H. Brandt, their agent. Berkeley refused to accept, and ordered Harris and Co. not to accept. Thereupon E. H. Brandt gave Harris and Co. the *endorsed* bill of lading, and desired them to accept for *his* account, which they did. Berkeley then confirmed his revocation, and was notified by E. H. Brandt that he should retain the whole of the wheat for the plaintiffs. Afterwards Berkeley offered to pay the price of the wheat and charges, but this was refused. The defendants delivered the wheat to Berkeley, instead of Harris and Co., as required by the bill of lading, and when sued in *assumpsit*, sought to defend themselves by maintaining that the property in the wheat had passed to Berkeley. The Court held the contrary, Parke B. saying: "That depends entirely on the intention of the consignors. It is said that the plaintiffs, by the very act of shipping the wheat in pursuance of Berkeley's order, irrevocably appropriated the property in it to him. I think that is not the effect of their conduct, for, looking to the letter of the 26th of August, it manifestly appears that they *intended that the property should not vest in Berkeley unless the bills were accepted.*"

§ 440. In *Wilmshurst v. Bowker*,¹ the plaintiffs bought wheat from defendant on a contract by which they promised

¹ 2 M. & G. 792.

to pay for it in a banker's draft, *on receipt of invoice and bill of lading*. The wheat was shipped, and the invoice and bill of lading properly laid out and *endorsed to the plaintiffs* were forwarded to them in a letter, in which the defendant requested them to remit him the amount of the invoice. Plaintiffs remitted a draft, which was not a banker's draft, and defendant sent it back by return of post, as being contrary to the agreement, and kept back the cargo and disposed of it. The plaintiffs had already failed in an action in trover,² and the present action was case for breach of contract. The judgment of the lower Court was again for defendant, Tindal C. J. saying: "There is no doubt that the *property* in the * wheat passed to the plaintiffs, . . . but [*334] the question is as to the intention of the parties, as evidenced by the contract, with reference to the *delivery of possession*. And we are of opinion that the intention of the parties under this contract was, that the consignors should *retain the power of withholding the actual delivery* of the wheat in case the consignee failed in remitting the banker's draft, not upon the delivery of the wheat, but upon the delivery of the bill of lading, . . . and we think the object could have been no other than to afford security to the consignors." But on error to the Exchequer Chamber, this decision was unanimously reversed,³ the Court, composed of Lord Abinger C. B., Parke, Alderson, and Rolfe, BB., and Patteson, Coleridge, and Wightman, JJ., saying that they acceded to the general principle of the judgment of the Common Pleas, but could not agree with it in inferring from the facts that the remitting of the banker's draft was a condition precedent to the vesting of the property in the plaintiffs. "The delivery of the bill of lading and remitting the banker's draft *could not* be simultaneous acts: the plaintiffs *must* have received the bill of lading and invoice *before* they could send the draft."

§ 441. In *Waite v. Baker*,¹ which is a leading case, decided in 1848, the facts were that the defendant at Bristol

² 5 Bing. N. C. 541.

¹ 2 Ex. 1.

³ 7 M. & G. 832.

bought from one Lethbridge 500 quarters of barley free on board at Kingsbridge, and in answer to an inquiry about the shipment wrote to Lethbridge: "I took it for granted that you would get a vessel for the barley I bought from you f. o. b., and therefore did not instruct you to seek one. . . . Please advise when you have taken up a vessel, with particulars of the port she loads in, so that I may get insurance done correctly."

By further correspondence, Lethbridge forwarded copy of the charter-party which he had taken in his own name; advised the commencement of the loading; and on the 1st of January, 1847, wrote: "I hope to be able to send you invoice and bill of lading on Tuesday or Wednesday." And again on the 6th: "I expect the bill of lading to-day or to- [*335] morrow. I expect to be in Exeter on *Friday, when it is very likely I shall run down and see you."

The bills of lading for the cargo were to the "order of Lethbridge or assigns, paying the freight as per charter." Lethbridge took them to Bristol, called on the defendant, and left at his counting-house, early in the morning, an *unendorsed* bill of lading. At an interview with defendant at a later hour on the same day, the defendant made objections to the quality of the cargo, saying that it was inferior to sample, offered to take the cargo and tendered the amount in money, but said that he should sue for eight shillings a quarter difference. Lethbridge refused to accept the money or to endorse the bill of lading, but took it up from the counter and went to the plaintiffs, from whom he obtained an advance on endorsing the bill of lading to them. The defendant obtained part of the barley from the ship before the plaintiffs presented their bill of lading, and the action was trover for the portion of the cargo so delivered. The jury found that the defendant did not refuse to accept the barley from Lethbridge; that the tender was unconditional; and that Lethbridge was not an agent intrusted with the bill of lading by defendant. There was a verdict for the plaintiff at Nisi Prius, and on the motion for new trial, Parke B. gave the reasons on which the rule was discharged: "It is perfectly clear that the original contract between the parties

was not for a specific chattel. That contract would be satisfied by the delivery of any 500 quarters of corn, provided the corn answered the character of that which was agreed to be delivered. By the original contract, therefore, no property passed, and that matter admits of no doubt whatever. In order, therefore, to deprive the original owner of the property it must be shown in this form of action,—the action being for the recovery of the property,—that at some subsequent time the property passed. It may be admitted that if goods are ordered by a person, although they are to be selected by the vendor and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods which have been selected in pursuance of the contract *are delivered [*336] to the carrier, the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and vendee, either by note in writing or by part payment, or subsequently by part acceptance, then there is no doubt that the property passes by such delivery to the carrier. It is necessary, of course, that the goods should agree with the contract. In this case it is said that the delivery of the goods on ship-board is equivalent to the delivery I have mentioned, because the ship was engaged on the part of Lethbridge as agent for the defendant. But assuming that it was so, the delivery of the goods on board the ship was not a delivery of them to the defendant, *but a delivery to the captain of the vessel, to be carried under a bill of lading*, and that bill of lading indicated the person for whom they were to be carried. By that bill of lading the goods were to be carried by the master of the vessel for and on account of Lethbridge, to be delivered to him in case the bill of lading should not be assigned, and if it should, then to the assignee. The goods therefore still continued in possession of the master of the vessel, not as in the case of a common carrier, but as a person carrying them on behalf of Lethbridge. . . . It is admitted by the learned counsel for the defendant that the property does not pass unless there is a subsequent appropriation of the goods. . . . Appropriation may be used

in another sense, viz., where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it. It is contended in this case that something of that sort subsequently took place. I must own that I think the delivery on board the vessel could not be an appropriation in that sense of the word. . . . The vendor has made his election to deliver those 500 quarters of corn. The next question is, whether the circumstances which occurred at Bristol afterwards, amount to an agreement by both parties that the property in those 500 quarters should pass. I think it is perfectly clear that there is no pretence for saying that Lethbridge agreed that [*337] *the property in that corn should pass. It is clear that his object was to have the contract repudiated, and thereby to free himself from all obligation to deliver the cargo. On the other hand, as has been observed, the defendant wished to obtain the cargo, and also to have the power of bringing an action if the corn did not agree with the sample. It seems evident to me that at the time when the unendorsed bill of lading was left, there was no agreement between the two parties that that specific cargo should become the property of the defendant. . . . There is a contract to deliver a cargo on board, and probably for an assignment of that cargo by endorsing the bill of lading to the defendant; but there was nothing which amounted to an *appropriation, in the sense of that term which alone would pass the property.*" This conclusion of the learned judge is substantially a statement that, though the determination of election by the vendor was complete, and the appropriation therefore perfect in one sense, yet the reservation of the *jus disponendi* prevented it from being complete "in that sense of the term which alone would pass the property." The case is quite in harmony with all the later decisions on the subject.

§ 442. *Van Casteel v. Booker*¹ was decided by the same Court in the same year. The goods in that case had been placed by the vendor on board of a vessel sent for them by

¹ 2 Ex. 691.

the vendees, and a bill of lading taken for them deliverable "to order or assigns," and showing that they were "freight free," and the bill of lading was endorsed in blank by the vendor and sent to the vendees. On the different questions arising in the case, which were numerous, it was held:

First, that the decisions in *Ellershaw v. Magniac*² and *Waite v. Baker*³ had been correct in holding that the fact of making the bill of lading deliverable to the order of the consignor, was decisive to show *that no property passed to the consignee, it being clearly intended by the consignor to preserve his title to the goods till he did a further act.*

* *Second*, that notwithstanding the form of the bill [*338] of lading, the contract may be really made by the consignor as agent of the vendee and in his behalf, and *it was a question for the jury*, in the case before the Court, what, under all the circumstances, was the real intention of the consignors or vendors. On the new trial, the jury found that the goods were put on board for, and on no account of, and at the risk of, the buyer, and the Court refused to set aside the general verdict for the defendants which had been entered on this finding of the jury.

§ 443. In 1850, the case of *Jenkyns v. Brown*,¹ was decided in the Queen's Bench. Klingender, a merchant in New Orleans, had bought a cargo of corn on the order of plaintiffs, and taken a bill of lading for it, deliverable to his own order. He then drew bills for the cost of the cargo on the plaintiffs, and sold the bills of exchange to a New Orleans banker, to whom he also endorsed the bill of lading. He sent invoices and a letter of advice to the plaintiffs, showing that the cargo was bought and shipped on their account. *Held*, that the property did not pass to plaintiffs, as the taking of a bill of lading by Klingender in his own name was "nearly conclusive evidence" that he did not intend to pass the property to plaintiffs; that by delivering the endorsed bill of lading to the buyer of the bills of exchange,

² 6 Ex. 570. The case was not reported till some years after it had been decided.

³ 2 Ex. 1.

¹ 14 Q. B. 496, and 19 L. J. Q. B. 286.

he had conveyed to them "a special property" in the cargo: and by the invoices and letter of advice to the plaintiffs, he had passed to them the "general property" in the cargo, subject to this special property, so that the plaintiffs' right to the goods would not arise till the bills of exchange were paid by them.

§ 444. The case of *Turner v. Trustees of Liverpool Docks*¹ was decided in the Exchequer Chamber in 1851, the Court being composed of Patteson, Coleridge, Wightman, Erle, Williams, and Talfourd, JJ. A cargo of cotton had [*339] been purchased in *Charleston, on the order of Higginson and Dean, of Liverpool, and put on board their own vessel, which had been sent for it. Bills of exchange for the price were drawn by Menlove and Co., on the buyers, and sold to Charleston bankers, to whom were transferred, as security, the bills of lading, which had been signed by the master. The bills of lading made the goods deliverable "to order, or to our (Menlove and Co.'s) assigns, he or they paying freight, *nothing being owner's property.*" The question was, whether by delivery on board the purchaser's own vessel, and by the statement in the bill of lading that the cotton was owner's property, the title had so passed as to render inoperative the transfer of the bill of lading to Charleston bankers. The Court took time to consider, and the decision was given by Patteson J. who said: "There is no doubt that the delivery of goods on board the purchaser's own ship is a delivery to him, unless the vendor protects himself by special terms, restraining the effect of such delivery. In the present case, the vendors, by the terms of the bill of lading, made the cotton deliverable at Liverpool, to their order or assigns, and there was not, therefore a delivery of the cotton to the purchasers *as owners*, although there was a delivery on board their ship. The vendors still *reserved to themselves*, at the time of delivery to the captain, the *jus disponendi* of the goods, which he by signing the bill

¹ 6 Ex. 543. See, also, *Schotsman v. Lancaster and York Railway Company*, 2 Ch. 332, and other cases cited *post*, Book V. Ch. 5, on "stoppage in transitu."

of lading acknowledged, and without which it may be assumed that the vendors would not have delivered them at all. . . . The plaintiffs in error rely upon the terms of the invoice and the expression in the bill of lading, that the cotton is free of freight, being owner's property, as showing that the delivery on board the ship was with intention to pass the property absolutely; but the operative terms of the bill of lading, as to the delivery of the goods at Liverpool, and the letter of Menlove and Co., of the 23d of October, show too clearly for doubt, that notwithstanding the other terms of the bill of lading and the invoice, Menlove and Co. had no intention, when they delivered the cotton on board, of parting with the dominion over it, or vesting the absolute property in the bankrupts."²

§ 445. * *Ellershaw v. Magniac*¹ was decided prior to [*340] *Van Casteel v. Booker*,² and is referred to in that case, but was not reported till 1851. There the plaintiff had contracted with C. and Co., of London and Odessa, for the purchase of 1700 quarters of Odessa linseed, had paid half the price, and had sent the *Woodhouse*, a vessel chartered by himself, "to take on board, from agents of the said freighter, about 1700 quarters of linseed, in bulk;" and a quantity of linseed was put on board the vessel at Odessa, the partner there writing to the London partner, "With regard to your sales of linseed, Mr. Ellershaw will receive a part by the *Woodhouse*;" and again, "By Friday's post you shall have the bill of lading of the linseed, by the *Woodhouse*." The Odessa partner afterwards took a bill of lading for the cargo, and made it deliverable "to order or assigns," and, being in difficulties, got advances by transferring the bills of lading to the defendant. Held, by the Court (Lord Abinger C. B. and Parke and Alderson BB.), that the shippers, by making the linseed deliverable to order by the bill of lading, clearly

² The case of *Turner v. Trustees of Liverpool Docks* is cited and approved by the Supreme Court of New York in the case of *Farmers' and Mechanics' Bank v. Logan*, 74 N. Y. 568. See, also, *The Frances*, 13

U. S. (9 Cr.) 183; bk. 3, L. ed. 698; and *Mirabita v. Imperial Ottoman Bank*, L. R. 3 Ex. Div. 164.

¹ 6 Ex. 570.

² 2 Ex. 691, 702.

showed *the intention to preserve the right of property and possession in themselves*, until they had made an assignment of the bill of lading to some other person: and the property, therefore, had not passed to the plaintiff.

§ 446. In *Joyce v. Swan*,¹ a decision was rendered in 1864, by the Common Pleas, on the following facts: McCarter, of Londonderry, on the 14th of February, 1863, ordered one hundred tons of guano, from Seagrave and Co., of Liverpool, with whom he had been in the habit of dealing, and was on very intimate terms. On the 26th, he was informed that Anne and Isabella had been engaged to carry about one hundred and fifteen tons, and "we presume we may value upon you at six months from the date of shipment at 10*l.* per ton. . . . Please say if you purpose effecting insurance at your end." On the 2d of March, McCarter ordered Joyce, the plaintiff, an insurance broker, to insure for him, "1200*l.*, on guano, valued at 1200*l.*, per Anne [*341] and Isabella, from *Liverpool to Derry." Then, on the 3d of March, McCarter wrote to Seagrave and Co., in relation to the price of 10*l.*: "I really cannot understand this, when I know that Mr. Lawson supplies your guano, in Scotland, at 9*l.* 15*s.* nett, there, to dealers; besides, I look for the special allowance made to me at the origin of our transactions, and now that you are making some changes, it may be as well that I should know how we are to get on for the future. I should be sorry, indeed, to appear unreasonable in my demands, but you will admit there is no one in this country has a prior claim on you." The letter ended with a request to send him some flowering shrubs, "in charge of captain." Seagrave and Co. received this letter on the 4th of March, fearing from its tenor that McCarter would not accept the cargo, insured it in their own name, on that day, and took a bill of lading, "to order of Seagrave and Co., or their assigns." They also on the same day made out an invoice of "the particulars of guano delivered to account of McCarter, by Seagrave and Co., per Anne and Isabella."

¹ 17 C. B. N. S. 84.

§ 447. The invoice and bill of lading were forwarded in a letter to the senior partner of Seagrave and Co., who was then in Ireland, and on the evening of Saturday, the 7th of March, he went on a friendly visit to McCarter's private house near Londonderry, and there told him that he had received these papers from his partners, who feared that McCarter was not satisfied. McCarter said he was quite willing to take the cargo, and on Monday morning they went into town together, and at McCarter's office Seagrave endorsed the bill of lading to McCarter and obtained from him an acceptance for the price, which he at once enclosed to his firm at Liverpool. After this and on the same day, they heard that the Anne and Isabella had been wrecked on the *evening of Saturday the 7th*. The action was on the policy effected by Joyce in behalf of McCarter, and was defended by the underwriters on the ground that the property had not passed to the purchaser, and that he had therefore no insurable interest.

Erle J. charged the jury that it was not a necessary condition of the passing of the property that the price should *be agreed on; that there might be a con- [*342] tract of sale, leaving the price to be afterwards settled; that if the guano was appropriated to McCarter when put on board by Seagrave and Co. with the intention of passing the property, they must find for the plaintiff, but *if they intended to keep it in their own hands* and under their own control till a final arrangement took place as to the terms of the bargain, they must find for defendant. The verdict was for plaintiff, and was sustained by the Court. The letter of McCarter was construed by the judges as a "grumbling" assent to the price.

§ 448. It is to be remarked that this case is not at all in conflict with *Turner v Liverpool Docks*, or *Waite v. Baker*, in holding that although the shipper took the bill of lading to his own order, yet the property had passed when the goods were put on board. The distinction is a plain one. In the former cases the shipper had taken the bill of lading to his own order, for the purpose of *retaining control* of the

goods for his own security; but in *Joyce v. Swan*, the shippers and vendors had no purpose nor desire to keep any control of the goods, but, on the contrary, wished the buyer to take them. They were doubtful of the buyer's meaning, and therefore took a precaution against leaving the property uninsured and uncared-for if his letter meant that he refused the purchase; but they were acting as his agents and intended to *reserve nothing, no jus disponendi*, if his meaning was that he assented to the price. The buyer interpreted his own language just as the Court did; he had meant to take the goods even at the price of 10*l.*, and that being so, the vendors were his agents in taking the bills of lading; and the case is exactly in accord with *Van Casteel v. Booker*,¹ where it was left to the jury to decide as a question of fact, what was the intention of the vendor under all the circumstances of the case; and with *Brown v. Hare*,² where it was held that the question of intention must be considered as having been disposed of by the verdict of the jury, because it was one of the facts for their decision on the trial.

[*343] § 449. * In *Moakes v. Nicholson*,¹ the facts were, that a sale was made by one Josse to Pope for cash, of a quantity of coal, parcel of a heap lying in Josse's yard, to be shipped on board of a vessel chartered by Pope in his own name and on his own behalf, to carry it to London. The coal was shipped by Josse, who took three bills of lading, making the coal deliverable to "Pope or order." Only one of the three bills was stamped, and that was kept by Josse, but the second, with invoice and letter of advice, was sent to Pope on the 19th of December, and received by him on the 20th. Josse, being unable to get the price from Pope, sent the stamped bill to his agent, the defendant. In the meantime, on the 13th of December, Pope had sold the coal on the London Exchange, but before it had been separated from the heap in Josse's yard, to the plaintiff, who paid for the coals before action brought. The defendant

¹ 2 Ex. 691.

¹ 34 L. J. C. P. 273; 19 C. B.

² In Ex. Ch. 4 H. & N. 822; 29 N. S. 290.

L. J. Ex. 6.

induced the captain of the vessel to refuse delivery to the plaintiff, and took possession of the coal himself. The plaintiff brought trover. *Held, first*, that the plaintiff had no better right than his vendor, Pope, because at the time of his purchase the goods were not ascertained and no bills of lading had been given, so that the sale had not been made by a transfer of documents of title: *secondly*, that no title had passed to Pope from Josse, because the retention of the stamped bill of lading by the latter was a clear indication of his intention to reserve the *jus diponendi*; *thirdly*, that the intention of Josse was a fact to be determined by the jury.² But *semble*, per Byles and Keating JJ., that if Pope's sale had been made after his receipt of the bill of lading by indorsing it over, although unstamped, to a *bona fide* purchaser, the result might have been different. The *ratio decidendi* of the case was clearly that Pope's sale was of a thing not yet his, of property not yet acquired, and therefore inoperative to pass the property. *Ante*, p. 78.

§ 450. In *Fulke v. Fletcher*,¹ the plaintiff, a merchant of Liverpool, acting in behalf of De Mattos of London, had *chartered from the defendant a vessel to [*344] load a complete cargo of salt for Calcutta. The plaintiff had put on board about 1000 tons of salt, for which he took receipts in his own name, when De Mattos failed, and the plaintiff declined to continue loading, whereupon the defendant filled up the vessel for his own account, and refused to deliver to the plaintiff bills of lading for the 1000 tons on the ground that they belonged to De Mattos. It was proven that the plaintiff was in the habit of buying such cargoes for De Mattos, and charged him no commission, but an advance on the cost of the salt to remunerate himself for his trouble; that the plaintiff always paid for the salt and loaded it at his own expense, and when the cargo was completed sent invoices to De Mattos and received the acceptances of the latter for the cost. *Held*, under these circumstances, a question of intention for the jury, whether the

² *Vide ante*, sec. 424, note 2.

¹ 18 C. B. N. S. 408; 34 L. J. C. P. 146.

plaintiff intended to part with the property in the salt or to reserve it, and a verdict in favor of the plaintiff that he had not parted with the goods was maintained.

§ 451. In *Shepherd v. Harrison*,¹ the facts were that Paton, Nash and Co., merchants of Pernambuco, bought for the plaintiff, a merchant of Manchester, certain cotton, and shipped it on the defendant's steamship *Olinda*, taking a bill of lading. Then they wrote to the plaintiff, saying, "Enclosed please find invoice *and bill of lading* of 200 bales cotton shipped per *Olinda*, costing 851*l.* 2*s.* 7*d.*" The letter also announced that a draft had been drawn for the price in favor of George Paton and Co., the agents in Liverpool of Paton, Nash and Co., "to which we beg your protection." The invoice was headed "Invoice, &c., on account and risk of Messrs. John Shepherd and Co. (the purchaser)." The bill of lading, however, was *not* enclosed in the letter to the plaintiff, but was, together with the bill of exchange, enclosed to George Paton and Co., of Liverpool, who at once sent a letter to the plaintiff enclosing the bill of lading and the bill of exchange drawn on him, and stating "We beg to enclose bill of lading for 200 bales cotton [*345] shipped by Paton, Nash * and Co., per *Olinda*, s. s. on your account. We hand also their draft on your good selves for cost of the cotton to which we beg your protection." The plaintiff refused to accept the bill of exchange, but retained the bill of lading, and demanded the cotton from the master of the ship, who however delivered the goods to George Paton and Co., on a duplicate bill of lading held by them, and on receiving an indemnity against the plaintiff's claim. The plaintiff's action was trover against the master, but all the Courts were unanimous in favor of the defendant, and it was held in the House of Lords: 1st. that the *jus disponendi* had been reserved by the vendors; 2dly. That where a bill of exchange for the price of goods is enclosed to the buyer for acceptance, together with the bill of lading which is the symbol of the property in the

¹ L. R. 4 Q. B. 196; in Ex. Ch. *ibid.* 493; in the House of Lords, L. R. 5 H. L. 116.

goods, the buyer cannot lawfully retain the bill of lading without accepting the bill of exchange; that if he does so retain it, he thereby acquires no right to the bill of lading or to the goods.²

§ 452. [In *Gabarron v. Kreeft*,¹ the defendants had bought from one Munoz all the ore of a certain mine in Spain to be shipped by Munoz f. o. b. at Cartagena, on ships to be chartered by the defendants, or by Munoz. The ore was to be paid for by acceptances against bills of lading, or on the execution of a charter-party, in which latter case a certificate that there was enough ore in stock to load the ship was to accompany the drafts. On being so paid for, the ore was to become the property of the defendants. Various vessels had been loaded, and others chartered, and various payments made up to March, 1872, when the Trowbridge, one of the ships chartered by the defendants, arrived at Cartagena. The payments that had been made at that time exceeded in amount the price of all the ore shipped and to be shipped in all the vessels chartered and not loaded; so that had Munoz shipped ore on the Trowbridge, he would have been entitled to no payment from the defendants in respect of it.

² The delivery of a bill of lading as a rule transfers the property from the vendor to the vendee and vests the title in the latter. *Robinson v. Stewart*, 68 Me. 61; *First National Bank v. Northern R. R.*, 58 N. H. 203; *Becker v. Haßgarten*, 86 N. Y. 167; *Merchants' Bank v. Union R. R. & T. Co.*, 69 N. Y. 373; *City Bank v. Rome, W. & O. R. R. Co.*, 44 N. Y. Co. 136; *Holmes v. Bailey*, 92 Pa. St. 57; *Holmes v. German Security Bank*, 87 Pa. St. 525; *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 360, 366; s. c. 18 Am. Rep. 299; see *McKee v. Garcelon*, 60 Me. 165; s. c. 11 Am. Rep. 200; *Stone v. Swift*, 21 Mass. (3 Pick.) 389; s. c. 16 Am. Dec. 349; *Peters v. Ballister*, 20 Mass. (3 Pick.) 495; *Hazard v. Fiske*, 83 N. Y. 287; *Joslyn v. Grand Trunk Ry. Co.*, 51 Vt. 92; *Tilden v. Minor*, 45 Vt. 196; *Davis v. Bradley*, 24 Vt. 55; s. c.

28 Vt. 118; 65 Am. Dec. 226; *Glyn v. East India Dock Co.*, 5 Q. B. Div. 129; s. c. 31 Week. R. 201; 35 Eng. Rep. 414; *Royal Canadian Bank v. Grand Trunk Ry. Co.*, 23 Up. Can. C. P. 225. See, also, *Dodge v. Meyer*, 61 Cal. 405, 416; *St. Paul Roller Mill Co. v. Great Western Dispatch Co.*, 27 Fed. Rep. 434; *Allen v. Jones*, 24 Fed. Rep. 11. But where a bill of lading is provisional it does not vest the property in the vendee or authorize him to take possession of it, except upon the conditions fixed by the bill of lading. *National Bank of Cairo v. Crocker*, 111 Mass. 163; *Allen v. Williams*, 29 Mass. (12 Pick.) 297. See *De Wolf v. Gardner*, 66 Mass. (12 Cush.) 19, 23; s. c. 59 Am. Dec. 165; *Shepherd v. Harrison*, L. R. 5 H. L. 116.

¹ L. R. 10 Ex. 274.

He had ore which he could and ought to have so shipped, taking bills of lading to the order of the defendants. In [*346] stead of doing this, before *any ore was put on board the Trowbridge, he picked a quarrel with the defendants, telegraphed to them that he would not load the Trowbridge on their account, and though they telegraphed back to him threatening him if he did not, he loaded the Trowbridge, and took out bills of lading making the shipment to be by one Sabadie, and the cargo deliverable to Sabadie's order. He then endorsed Sabadie's and his own name on the bills of lading, and pledged them for value with the plaintiffs. No certificate in relation to this ore was given by Munoz to the defendants. The captain was justified in giving the bills of lading, as the charter-party contained a clause authorizing him to "sign bills of lading as presented." It was agreed that at the time of shipment Munoz had no intention to ship the ore for the defendants. The question was whether the plaintiffs, or the defendants, were entitled to the cargo, and this depended for its decision on whether the property became vested in the defendants upon the ore being paid for, as the contract provided it should, or upon shipment on board the vessel chartered by the defendants. The Court of Exchequer held that the plaintiffs were entitled. Bramwell and Cleasby BB. rested their decisions upon the following grounds: — That notwithstanding the provision in the contract to that effect, the payment of the price could not *per se* operate to transfer the property in the ore to the defendants, so long as the ore had not been separated from the bulk of the stock; that there was no evidence of a specific appropriation of the ore in fulfilment of the contract previous to shipment;² and that shipment on board a vessel chartered by the defendants did not vest the property in them, when the shipper in dealing with the bills of lading has manifested his intention to reserve the *jus disponendi*. Kelly C. B. came to the same conclusion upon a quite distinct ground, viz.: that as the defendants by the terms of the charter-party had authorized the master to sign bills of

² See *ante*, p. 296.

lading as presented, they were estopped from disputing plaintiffs' title as *bona fide* indorsees for value.

§ 453. It will be observed that although the agreement provided that the ore was to become the property of the defendants upon * being paid for, yet, since the [*347] sale was not one of specific goods, it was necessary that there should be some subsequent appropriation by Munoz for the defendants before the property could actually vest in them. In the absence of any evidence of such appropriation previous to shipment, the question was reduced to this;— Did the property pass on actual shipment, the shipper having no right to ship, except to pass the property, and having no right to retain possession for any lien for the price or otherwise, but taking, when he did take it, a bill of lading, deliverable otherwise than to the defendants, to whom it ought to have been made deliverable? and after a careful review of the authorities cited in the text it was held, that the property did not pass. After commenting on *Ellershaw v. Magniac*, *Turner v. Trustees of the Liverpool Docks*, *Fulke v. Fletcher*, *Waite v. Baker*, and *Moakes v. Nicholson*, Bramwell B. says, at p. 281: "The cases seem to me to show that the act of shipment is not completed till the bill of lading is given; that if what is shipped is the shipper's property till shipped on account of the shipowner or charterer, it remains uncertain on whose account it is shipped, and is not shipped on the latter's account till the bill of lading is given deliverable to him." And Cleasby B., at p. 285, referring to *Turner v. Trustees of the Liverpool Docks*, and *Shepherd v. Harrison*, as being respectively an early and the latest authority on the subject says: "The effect of these decisions is that the delivery of goods contracted for, on board a ship when a bill of lading is taken, is not a delivery to the buyer, but to the captain as bailee to deliver to the person indicated by the bill of lading, and that this may equally apply when the ship is the ship of the vendee."

§ 454. In *Ogg v. Shuter*,¹ the facts were that the plaintiffs had made a contract for the purchase of 20 tons of potatoes

¹ 1 C. P. D. 47 C. A. reversing s. c. L. R. 10 C. P. 159.

to be delivered *free on board* at Dunkirk, price to be paid in *cash against bill of lading*, and the plaintiffs were to pay *part of the price* in earnest of the bargain. The potatoes were shipped under the contract in the *plaintiffs' own sacks* under a bill of lading which made them deliverable to the [*348] vendor's * order, and the plaintiffs paid 30*l.* in part payment of the price. The vendor endorsed the bill of lading to the defendant, who was his agent in London, and he upon the arrival of the ship presented to the plaintiffs a draft for the balance of the purchase-money with the bill of lading annexed. The plaintiffs, believing that the shipment was short, declined to accept the draft for the full amount, and thereupon the defendant *sold* the potatoes to another party. In an action against the defendant for conversion, a verdict was entered by consent for the plaintiffs, leave being reserved to the defendant to move that it should be entered for him, the Court to draw inferences of fact. It was held by the Court of Common Pleas that the property in the potatoes had passed to the plaintiffs, on the ground that any evidence of the vendor's intention to reserve the *jus disponendi* manifested by the expression in the contract "cash against bill of lading," and by the fact of the vendor taking the bill of lading to his own order, was over-ridden by the other terms of the contract, viz., that the potatoes should be delivered "free on board," and that there should be part payment of the price, coupled with the fact that the potatoes were delivered into the plaintiffs' own sacks.

This decision was reserved on appeal, the Court of Appeal holding—

First, that the retention by the vendor in his agent's hands of the bill of lading in the form in which it was taken was effectual to reserve the *jus disponendi*.

Secondly, that the right so reserved was not merely a vendor's lien on the goods, but involved *the right to dispose of the goods by sale* or otherwise, so long at least as the buyer remained in default.

§ 455. In *Ex parte Banner*,¹ the firm of Christiansen & Co. who carried on business at Para, in South America, acted

¹ 2 Ch. D. 278, C. A.

as commission agents in the purchase and consignment of goods for Tappenbeck & Co., at Liverpool. The course of dealing between the parties was as follows:—Christiansen & Co., in order to provide funds for the * pur- [*349] chase of goods, drew bills of exchange on Tappenbeck & Co., which they discounted at Para. They then purchased the goods with the proceeds, and shipped them for Liverpool, and sent *the bills of lading making the goods deliverable to Tappenbeck & Co.* and the invoices of the goods by post direct to Tappenbeck & Co. At the same time Tappenbeck & Co. were advised of the bills drawn upon them, which, in the ordinary course, they accepted on presentment, and paid at maturity. Both Christiansen & Co. and Tappenbeck & Co. stopped payment. At the time of Tappenbeck & Co.'s stopping payment considerable quantities of goods were in transit between Para and Liverpool, and on their arrival were taken possession of by the trustee in their liquidation. Some of the bills, out of the proceeds of which the goods had been purchased, were accepted, and others refused acceptance by Tappenbeck & Co. but none of them were paid at maturity. *Held*, by the Court of Appeal, reversing the decision of Bacon C. J. that the property in the goods had passed unconditionally to Tappenbeck & Co. and through them to their trustee, and that the creditors of Christiansen & Co. were not entitled to have the goods or their proceeds appropriated to meet the bills drawn in respect of them. *Shepherd v. Harrison* was expressly distinguished on the ground that there the consignor had taken the precaution to make the goods deliverable to his own order, and to forward the endorsed bill of lading, together with the bill of exchange, to an agent of his own. Mellish L. J. in delivering the judgment of the Court, said (at page 288): "We think that as soon as the goods were put on board ship at Para and the bills of lading making the goods deliverable to Tappenbeck & Co. *were put into the post directed to Tappenbeck & Co. and were thus placed beyond the control of Christiansen & Co.* the property in the goods passed to Tappenbeck & Co. We conceive it is perfectly settled that if a consignor in such a case wishes to prevent the property in the

goods, and the right to deal with the goods, whilst at sea, from passing to the consignee, he must by the bill of lading make the goods deliverable to his own order, and [*350] *forward the bill of lading to an agent of his own.

If he does not do that, he still retains the right of stopping the goods in transitu, but subject to that right the property in the goods and the right to the possession of the goods is in the consignee."

§ 456. In *Mirabita v. Imperial Ottoman Bank*,¹ the facts, so far as material, were these:—The vendors shipped a cargo of lumber on board a ship chartered for the plaintiff, and took bills of lading making the cargo deliverable "to order or assigns." They drew a bill of exchange for the price upon the plaintiff, which they, discounted with the defendant bank, at the same time handing over to them the bills of lading to be given up to the plaintiff upon his meeting the bill of exchange at maturity. A fresh bill of exchange was afterwards substituted and transferred to the bank in exchange for the original bill. On the arrival of the cargo the plaintiff at first declined to accept the bill, *but he subsequently tendered the amount for which it was drawn*, and demanded the delivery of the bills of lading. The defendants refused to accept the amount of the bill and sold the cargo. The question was, whether under these circumstances the property in the goods had passed to the plaintiff so as to entitle him to maintain an action of trover against the defendants.² The Court of Appeal were unanimously of opinion that it had. It was clear that the intention of the vendors was that the property should vest in the plaintiff, subject only to his acceptance and payment of the bill of exchange, and that the defendants were bound to give up the bills of lading to the plaintiff, upon his so doing. Cotton L. J. (at page 172) gives so clear an exposition of the principles that run through the decisions that we have ven-

¹ 3 Ex. D. 164, C. A.

² The action was commenced before the Judicature Acts, and therefore dealt with as a legal question,

and not upon the equitable rights of the parties. See per Cotton L. J., at p. 171.

tured to transcribe it in full. "Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the * contract, that [*351] is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so, not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchaser. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein; and accordingly in *Waite v. Baker*, *Ellershaw v. Magniac* and *Gabarron v. Kreeft*, (in each of which cases the vendors had dealt with the bills of lading for their own benefit,) the decisions were that the purchaser had no property in the goods, though he had offered to accept bills for or had paid the price. So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so it was decided in *Turner v. Trustees of Liverpool Docks*, *Shepherd v. Harrison*, and *Ogg v. Shuter*. But if the bill of lading has been dealt with only to secure the contract price,

there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not, on payment or tender by the purchaser of the contract price, vest in him. * When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and in my opinion, under such circumstances the property does, on payment or tender of the price, pass to the purchaser.”]

§ 457. The following seem to be the principles established by the foregoing authorities:—

First.—Where goods are delivered by the vendor in pursuance of an order, to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the vendee to receive it, and the delivery to him being equivalent to a delivery to the vendee.¹

¹ *Waite v. Baker*, 2 Ex. 1. See, also, *Dawes v. Peck*, 8 T. R. 330; *Dutton v. Solomonson*, 3 B. & P. 582; *London and North Western Railway Company v. Bartlett*, 7 H. & N. 400, and 31 L. J. Ex. 92; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Cork Distilleries Company v. Great Southern Railway Company*, L. R. 7 H. L. 269. See, also, *Bushel v. Wheeler*, 15 Ad. & E. 442; *Dutton v. Solomonson*, 3 Bos. & Pul. 582; *Cooke v. Ludlow*, 1 Bos. & Pul. N. R. 119; *Vale v. Bayle*, Cowp. 294; *Hart v. Bush*, 1 El. Bl. & El. 494; *Meredith v. Meigh*, 2 El. & Bl. 364; s. c. 75 Eng. C. L. 365; *Coats v. Chaplin*, 3 Adol. & El. N. S. 483; s. c. 43 Eng. C. L. 831; *Acebal v. Levy*, 10 Bing. 376; s. c. 25 Eng. C. L. 170; *Bentall v. Burn*, 3 Barn. & Cr. 423; s. c. 10 Eng. C. L. 138; *Hanson v. Armitage*, 5 Barn. & Ald. 557; s. c. 7 Eng. C. L. 191; *Howe v. Palmer*, 3 Barn. & Ald. 321; s. c. 5 Eng. C. L. 303; *Holmes v. Hoskins*, 28 Eng. L. & Eq. 564; *Hunt v. Hecht*, 20 Eng. L. & Eq. 524; *Castle v. Swarder*, 5 Hurls. & N. 281;

Coombs v. Bristol, &c. Ry. Co., 3 Hurls. & N. 510; *Farina v. Home*, 16 Mees. & W. 119; *Norman v. Phillips*, 14 Mees. & W. 278; *Dawes v. Peck*, 8 T. R. 330.

American authorities.—*Watkins v. Paine*, 57 Ga. 50; *Maxwell v. Brown*, 39 Me. 98; s. c. 63 Am. Dec. 695; *Wing v. Clark*, 24 Me. 366; *Magruder v. Gage*, 33 Md. 344; s. c. 3 Am. Rep. 177; *First Nat. Bank of Cairo v. Crocker*, 111 Mass. 163; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291; *Nichols v. Morse*, 100 Mass. 523; *Johnson v. Stoddard*, 100 Mass. 306; *Hunter v. Wright*, 94 Mass. (12 Allen) 548; *Merchant v. Chapman*, 86 Mass. (4 Allen) 362; *Orcutt v. Nelson*, 67 Mass. (1 Gray) 536; *Frostburg Mining Co. v. New England Glass Co.*, 63 Mass. (9 Cush.) 115; *Putnam v. Tillotson*, 54 Mass. (13 Metc.) 517; *Baker v. Fuller*, 38 Mass. (21 Pick.) 318; *Stanton v. Eager*, 33 Mass. (16 Pick.) 467; *Arnold v. Prout*, 51 N. H. 587, 589; *Garland v. Lane*, 46 N. H. 245; *Smith v. Smith*, 27 N. H. 244; *Gassett v. Godfrey*, 26 N. H. (6 Post.)

§ 458. *Secondly.*—Where goods are delivered on board of a vessel to be carried, and a bill of lading is taken, the delivery by the vendor is not a delivery to the buyer, but to the captain as bailee for delivery to the person indicated by the bill of lading, as the one for whom they are to be carried.¹ This principle runs through all the cases, and is clearly enunciated by Parke B. in *Waite v. Baker*,² and by Byles J. in *Moakes v. Nicholson*,³ [and by Bramwell and Cleasby BB. in *Gabarron v. Kreeft*,⁴ and by Cotton L. J. in *Mirabita v. Imperial Ottoman Bank*.⁵

And the above two points were approved as an accurate statement of the law by Lord Chelmsford in *Shepherd v. Harrison*, *supra*.

§ 459. *Thirdly.*—The fact of making the bill of lading,¹ deliverable to the order of the vendor, is, when not rebutted

415; *Rodgers v. Phillips*, 40 N. Y. 519; *Waldron v. Romaine*, 22 N. Y. 388; *Ludlow v. Bowne*, 1 Johns. (N. Y.) 1; s. c. 3 Am. Dec. 277; *Summeril v. Elder*, 1 Binn. (Pa.) 106; *Griffith v. Ingledew*, 6 Serg. & R. (Pa.) 429; s. c. 9 Am. Dec. 444; *Hobart v. Littlefield*, 13 R. I. 341, 346; *Goodwyn v. Douglas*, Cheves L. & Eq. (S. C.) 174; *Ranney v. Higby*, 5 Wis. 62; *Hatch v. Oil Co.*, 100 U. S. (10 Otto) 124; bk. 25, L. ed. 554; *The Mary and Susan*, 14 U. S. (1 Wheat.) 25; bk. 4, L. ed. 27; *The Frances*, 13 U. S. (9 Cr.) 183; bk. 3, L. ed. 698; *Sortwell v. Hughes*, 1 Curt. C. C. 244; *Barrett v. Goddard*, 3 Mason C. C. 107; *Hilliard on Sales* (2d ed.) 118, 119; *Atkinson on Contr. of Sales*, 199, 202; 1 *Pars. on Contracts*, 445; *Story on Contr. sec. 804, 806*.

¹ *Delivery to carrier* is not necessarily a delivery to the vendee. Thus it was said in *White v. Baker*, 2 Ex. 1, that "the delivery of goods on board the ship was not a delivery of them to the defendant, but a delivery to the captain to be carried under a bill of lading, and that bill of lading indicated the person for whom they

were to be carried." See, also, *Gabarron v. Kreeft*, L. R. 10 Ex. 274; *Moakes v. Nicholson*, 19 C. B. N. S. 290; s. c. 34 L. J. C. P. 273; *Van Casteel v. Booker*, 2 Ex. 691; s. c. 18 L. J. Ex. 9.

² 2 Ex. 1.

³ 19 C. B. N. S. 290; 34 L. J. C. P. 273.

⁴ L. R. 10 Ex. at pp. 281 and 285.

⁵ 3 Ex. D. C. A. at p. 172.

¹ *The bills of lading* by the law merchant are the representatives of the property for which they have been given. See *Dodge v. Meyer*, 61 Cal. 405, 416; *Myerstein v. Barber*, L. R. 4 App. Cas. 317; s. c. L. R. 2 C. P. 308, 316. And their delivery is a symbolical transfer of chattels not conveniently situated for manual delivery. *McKee v. Garcelon*, 60 Me. 165; s. c. 11 Am. Rep. 200; *Gardner v. Howland*, 19 Mass. (2 Pick.) 699; *Becker v. Hallgarten*, 86 N. Y. 167; *Dows v. Greene*, 24 N. Y. 638; *The Vaughan and Telegraph*, 81 U. S. (14 Wall.) 258; bk. 20, L. ed. 807; *Gibson v. Stevens*, 49 U. S. (8 How.) 399; bk. 12, L. ed. 1123, 1129; *Conard v. Atlantic Ins. Co.*, 26 U. S. (1 Pet.) 386; bk. 7, L. ed. 189; *Mc-*

by evidence to the contrary, almost decisive to show his intention to reserve the *jus disponendi*, and to prevent the property from passing to the vendee.²

[*353] § 460. * *Fourthly*. — The *prima facie* conclusion that the vendor reserves the *jus disponendi*, when the bill of lading is to his order, may be rebutted by proof that in so doing he acted as agent for the vendee, and did not intend to retain control of the property; and it is for the jury to determine as a question of fact what the real intention was.¹

§ 461. *Fifthly*. — That although as a general rule the delivery of goods by the vendor, on board the purchaser's own ship, is a delivery to the purchaser, and passes the property, yet the vendor may by special terms restrain the effect of such delivery, and reserve the *jus disponendi*, even in cases where the bills of lading show that the goods are free of

Ewan v. Smith, 2 H. L. Cas. 309; *Lickbarrow v. Mason*, 2 T. R. 361; *Schouler on Pers. Prop.* 471, 472, 556; 1 *Smith's Lead. Cas.* 848.

A bill of lading is a symbol of the ownership of the goods covered by it, and the transmission of such bill of lading transfers the possession of the property described in it, and is a compliance with the Statute of Frauds as to the sale and delivery of property. *Walsh v. Blakely*, 6 Mont. 194.

When the manufacturer, on receipt of the order, selects a particular article, and forwards it by railroad, as directed, taking the bill of lading in his own name, attaching to it the draft for the price, and indorsing it to the freight agent at the place of destination, with instructions to "deliver to bearer"; these facts show an intention to retain the title until payment, and a loss by accidental fire at the railroad depot falls on the seller. *Jones v. Brewer*, 79 Ala. 545.

² *Wilmshurst v. Bowker*, 2 M. & G. 792; *Ellershaw v. Magniac*, 6 Ex. 570; *Waite v. Baker*, 2 Ex. 1; *Van Casteel v. Booker*, 2 Ex. 691; *Jen-*

kyns v. Brown, 14 Q. B. 496, and 19 L. J. Q. B. 286; *Shepherd v. Harrison*, L. R. 4 Q. B. 196; in *Ex. Ch. ibid.* 493; L. R. 5 H. L. 116; *Gabarron v. Kreeft*, L. R. 10 Ex. 274; *Ogg v. Shuter*, 1 C. P. D. 47 C. A.; *Ex parte Banner*, 2 Ch. D. 78, C. A. See *First Nat. Bank of Cairo v. Crocker*, 111 Mass. 163, 167; *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291, 296; *Turner v. Trustees of Liverpool Docks*, 6 Ex. 543; *Mason v. Great Western Ry. Co.*, 31 Up. Can. Q. B. 73, 81.

Passing of title. — It is always a question of intent, whether the property passes to the vendor by the contract or not. *Young v. Matthews*, L. R. 1 C. P. 237; *Gurney v. Behrend*, 3 El. & Bl. 631, 636; *Turley v. Bates*, 2 Hurls. & C. 200; *Mason v. Great Western R. R. Co.*, 31 Up. Can. Q. B. 73, 81. *Vide ante* "Reservation of Control."

¹ *Van Casteel v. Booker*, 2 Ex. 691; *Brown v. Hare*, 4 H. & N. 822 and 29 L. J. Ex. 6; *Joyce v. Swan*, 17 C. B. N. S. 84; *Moakes v. Nicholson*, 19 C. B. N. S. 290; 34 L. J. C. P. 273.

freight, because owner's property.¹ [And on a sale of goods which are not specific, although the goods have been delivered on board a ship of, or chartered for, the purchaser, yet, in the absence of any appropriation of the goods in fulfillment of the contract previous to shipment, the fact that the vendor has taken a bill of lading, making the goods deliverable to his own order, or that of a third person, will prevent the property in them from passing to the purchaser.²]

§ 462. *Sixthly.*—That where a bill of exchange for the price of the goods is enclosed to the buyer for acceptance, together with the bill of lading, the buyer cannot retain the bill of lading unless he accepts the bill of exchange: and if he refuse acceptance, he acquires no right to the bill of lading or the goods of which it is the symbol.¹ [And the vendor may * exercise his *jus disponendi* by selling [*354] or otherwise disposing of the goods, so long at least as the buyer remains in default.²]

§ 463. [*Seventhly.*—But although the vendor may intend the transfer of the property to be conditional upon the buyer's

¹ *Turner v. Liverpool Dock Trustees*, 6 Ex. 548; *Ellershaw v. Magniac*, 6 Ex. 570; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Van Casteel v. Booker*, 2 Ex. 691; *Moakes v. Nicholson*, 19 C. B. N. S. 290; 34 L. J. C. P. 272; *Fulke v. Fletcher*, 18 C. B. N. S. 408; 34 L. J. C. P. 146; *Schotsman v. Lancashire and Yorkshire Railway Co.*, 2 Ch. 332; *Gumm v. Tyrie*, 33 L. J. Q. B. 97; in error, 34 L. J. Q. B. 124.

² *Gabarron v. Kreeft*, L. R. 10 Ex. 274.

¹ *Shepherd v. Harrison*, L. R. 4 Q. B. 196; in Ex. Ch. *ibid.* 493; 5 H. L. 116; *Ogg v. Shuter*, 1 C. P. D. 47 C. A.

American authorities.—*Cobb v. Illinois Cent. R. R. Co.*, 88 Ill. 394; *Taylor v. Turner*, 87 Ill. 297; *Alderman v. Eastern Ry. Co.*, 115 Mass. 233; *Newcomb v. Boston & L. R. R. Co.*, 115 Mass. 230; *First Nat. Bank of Chicago v. Bayley*, 115 Mass.

228; *First Nat. Bank v. Dearborn*, 115 Mass. 219; *First Nat. Bank of Cairo v. Crocker*, 111 Mass. 163; *Marine Bank of Chicago v. Wright*, 48 N. Y. 1; *City Bank v. Rome, W. & O. R. R. Co.*, 44 N. Y. 137; *Winter v. Coit*, 7 N. Y. 288; s. c. 57 Am. Dec. 522; *Bank of Rochester v. Jones*, 4 N. Y. 497, 502; s. c. 55 Am. Dec. 290; *Millar v. Savings Association (Pa.)*, 3 Week. N. C. 480; *Bank v. Shaw (Pa.)*, 2 Week. N. C. 542; *Henry v. Warehouse Co. (Pa.)*, 2 Week. N. C. 389; *Patten v. Thompson*, 5 Maule & S. 350; *Clark v. Bank of Montreal*, 13 Grant (Ont.) 211; 2 Kent Com. 207; *Parsons Mer. L.* 346. See, also, *Goodenough v. City Bank*, 10 Up. Can. C. P. 51; *Wisconsin Marine & F. Ins. Co. v. Bank of British North America*, 21 Up. Can. Q. B. 284; s. c. 2 Err. & App. 282.

² *Ogg v. Shuter*, 1 C. P. D. 47, C. A.

acceptance of the bill of exchange, yet, if he puts into the post addressed to the buyer a bill of lading making the goods deliverable to the buyer's order, he thereby abandons all control over the goods, and the property thereupon vests unconditionally in the buyer, and does not revert in the vendor on the buyer's failure or refusal to accept the bill of exchange.¹]

§ 464. [*Eighthly*. — When the vendor deals with the bill of lading only to secure the contract price, as, *e.g.*, by depositing it with bankers who have discounted the bill of exchange, then the property vests in the buyer upon the payment or tender by him of the contract price.¹

¹ *Ex parte Banner*, 2 Ch. D. 78, C. A., distinguishing *Shepherd v. Harrison*, L. R. 4 Q. B. 196 and 493; L. R. 5 H. L. 116.

American authorities. — *Taylor v. Turner*, 87 Ill. 296; *Michigan Cent. Ry. v. Phillips*, 60 Ill. 190; *Halsey v. Warden*, 25 Kans. 128; *Stollenwerck v. Thacher*, 115 Mass. 224; *First Nat. Bank v. Dearborn*, 115 Mass. 219; *Marine Bank v. Fiske*, 71 N. Y. 353; *Merchants' Bank v. Union R. R. & Transp. Co.*, 69 N. Y. 373; *First Nat. Bank of Toledo v. Shaw*, 61 N. Y. 233; *Ontario Bank v. New Jersey Steamboat Co.*, 59 N. Y. 510; *Bailey v. Hudson R. R. Co.*, 49 N. Y. 70;

Marine Bank of Chicago v. Wright, 48 N. Y. 1; *First Nat. Bank v. Kelly*, 57 N. Y. 34; *Bank of Rochester v. Jones*, 4 N. Y. 497; s. c. 55 Am. Dec. 260; *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 360; s. c. 18 Am. Rep. 299; *Lester v. McDowell*, 18 Pa. St. 91; *Refining & Storage Co. v. Miller*, 7 Phila. (Pa.) 97; *Gibson v. Stevens*, 49 U. S. (8 How.) 384; bk. 12, L. ed. 1123.

¹ *Mirabita v. Imperial Ottoman Bank*, 3 Ex. D. 164, C. A., determining a point left undecided by *Lord Cairns in Ogg v. Shuter*, 1 C. P. D. at p. 51.

* CHAPTER VII.

[*355]

EFFECT OF A SALE BY THE CIVIL FRENCH AND
SCOTCH LAW.

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§ 465. AN attempt must now be made to give a summary, necessarily very imperfect, of the principles of the Civil Law, in regard to the nature of the contract of sale and its effect in passing the property in the thing sold. The subject is the more difficult, because there is a marked distinction between the modern civil law and the Roman law, and because the doctrines are subtle and technical, requiring for elucidation at least some general idea of the mode in which the Romans entered into contracts at different periods in their history.

§ 466. The civilians of the present generation have enjoyed an immense advantage over their eminent predecessors, Pothier and d'Aguesseau, Cujas and Vinnius, Domat and Dumoulins. The Digest, Code and Institutes of Justin-

ian, compiled in the sixth century, during the reign of that emperor (A.D. 527-565), formed prior to the year 1816, the almost exclusive source from which was derived a [*356] knowledge * of Roman jurisprudence; and in that famous *corpus juris civilis*, the name of Gaius was confounded with those of the other eminent jurists, whose responses (or as we should call them opinions on cases submitted), were adopted by the imperial law-giver as a part of the statutory law of the empire. It was, however, known that the Institutes of Justinian were modelled on those of Gaius, who lived nearly four centuries earlier, during the reigns of Antoninus Pius and Marcus Aurelius. But the works of Gaius were believed to be irretrievably lost till the year 1816, when Niebuhr discovered in a convent at Verona a parchment manuscript of Roman law, of which the original text had been partially obliterated to give place to a theological work of one of the fathers of the fifth century.¹ Savigny recognized the old writing to be the text of Gaius, and after several months of patient labor, the original manuscript was restored almost in its integrity, thus giving to the civilians a succinct and methodical treatise on the whole body of the Roman law as it existed in the second century of our era. By means of this invaluable addition to former sources of information, the modern German and French commentators have been able to pour a flood of light on many questions formerly obscure, and it is from their works that the following summary is chiefly extracted.

§ 467. Sale was considered as the offspring of exchange, and for many centuries it was disputed whether there was any difference in the nature of these contracts. “*Origo emendi, vendendique a permutationibus cæpit, olim enim non ita erat nummus; neque aliud merx, aliud pretium vocabatur.*”¹ And in the earliest period of the republic, when the laws of the Twelve Tables sufficed for the simple dealings of a rude peasantry, or of the poor city clients of the

¹ See a very interesting account of this discovery in the preface to the first edition of Gaius.

¹ Dig. 18, 1. De Contrah. Emptione. And see *ante*, p. 1, note (a).

Roman patricians, the contracts were formed solely by means of actual exchange made on the spot, as the very names evince; for the things were either exchanged by the *permutatio*, or *given* for a price by the *venumdatio*.

§ 468. * Afterwards, when the idea of binding one [*357] party to another by consent, and thus forming an obligation (*juris vinculum*), was entertained, the whole body of possible engagements between man and man was included in the three expressions, *dare, facere, præstare*: *dare*, to give, that is, to transfer ownership: *facere*, to do, or even abstain from doing an act: *præstare*, to furnish or warrant an enjoyment or advantage or benefit to another. And these three classes of engagements might arise out of three classes of obligations, only two of which gave a right of action, the third being available only for defence in some special cases. The three classes of obligation were *civil* obligations, which gave a right of action at law: *prætorian* or *honorary* obligations, which gave the right to sue in equity, that is, to invoke the equitable jurisdiction of the prætor:¹ and *natural* obligations, for which there was no action at law or in equity, but which might be used in defence, as in *compensatio* or set-off. “*Etiam quod natura debetur, venit in compensationem.*”²

The vendee then, like all other contracting parties, had certain actions³ which alone he has permitted to institute against the vendor. The Institutes of Gaius give us the form of declaration in an action *in personam*. “*In personam actio est, quotiens cum aliquo agimus, qui nobis ex contractu, vel ex delicto obligatus est: id est, cum intendimus, dare, facere, præstare oportere.*”

§ 469. Now, the mode of forming contracts of sale in Rome passed through four successive stages after the primitive one of actual exchange from hand to hand. 1st, the *nexum*, which was effected *per æs et libram*, and consisted in weighing out a certain weight of brass, and using certain solemn words, *nuncupatio*, which operated together as a symbol to form a perfect sale (at a period when men had not

¹ For these two classes giving rights of action, see Inst. 3, 13, 1.

² Dig. 16, 2, 6, Ulp.

³ Com. 4, § 2.

learned to write), termed *nexum*, *mancipium*, *mancipatio*, *alienatio per æs et libram*, all of which had fallen into disuse and derision long before the time of Gaius,¹ who [*358] says, "in *odium venerunt." 2d, the sale by certain sacramental words alone, and dispensing with the *æs et libram*: this was the *stipulation*² which bound only *one side*, from its very nature, because it consisted in a promise made in response to the stipulator. A stipulation, therefore, might bind the vendor or the vendee; it required *two* stipulations to bind both. The rigorous solemnities and sacramental formulæ of the old law of the Quirites, were upheld with strictness by the Patricians and Priests, so that by an exaggerated technicality, the words "Spondes? Spondeo," forming a stipulation, were not allowed to be used by any but Roman citizens,³ foreigners and barbarians being compelled to adopt other words, as "Promittis," "Dabis," "Facies," for the same purpose, these latter expressions being deemed *juris gentium*. But Justinian tells us that this form of contract was obsolete in his day.⁴ 3d. The third step in the progress of the law naturally occurred when men had learned generally to write, and every Roman citizen kept a book called a register or account-book (*tabulæ*, *codex accepti et depensi*). The law declared that an entry made in this book in certain terms, admitting the price to be considered as weighed out and given, should be equivalent to the actual ceremony *per æs et libram*, and should constitute not simply a proof of the sale, but the written contract itself, *literarum obligatio*. This book was carefully written out once a month

¹ Gai. 4, 30.

² The etymology of this word is doubtful: Paulus derives from *Stipulum*, an old word, meaning firm. Sent. 5, 7, § 1. See, also, Inst. 3, 15. Festus, in his Abridgment of Valerius Flaccus, says: "Stipem esse nummum signatum, testimonio est et id, quod datur stipendium militi, et quum spondetur pecunia, quod stipulari dicitur;" and Isidor of Seville (lib. 4, Orig. c. 24), says: "Dicta stipulatio a stipula. Veteres enim quando sibi aliquid promittebant,

stipulam tenentes frangebant, quam iterum jugentes, sponsiones suas agnoscebant." This last etymology seems to be merely an invention, as the French say, *après coup*. Such a mode of contracting, and such a derivation, if true, could scarcely have been unknown to Paulus and Festus. The word is probably akin to *stipes*, a post,—from *ŮSTAP* to make firm, an extension of *ŮSTA* to stand.

³ Gai. Com. 3, 93.

⁴ Inst. 3, 15, 1.

from a diary or blotter (*adversaria*), and was treated as a proof of the highest character, Cicero saying of the *tabulæ*, * that they are "*æternæ, sanctæ, quæ perpetuæ* [*359] *existimationis fidem et religionem amplectuntur.*"⁵

This contract was said also to be an *expensilatio*, from the entries in these books, the party who paid money entering it under this head, as *pecunia expensa lata*, and the one who received it, as *pecunia accepta relata*. 4th. The fourth and last stage was the contract by mutual consent alone; and it is again a remarkable instance of the strict technicality of the Roman law,⁶ that it allowed but four contracts to be made in this manner, on the ground that they were contracts *juris gentium*, while all others were still required to be made with the formalities of the Roman municipal statutes. These four contracts are sale (*emptio-venditio*), letting for hire (*locatio-conductio*), partnership (*societas*), and agency or mandate (*mandatum*). They are, also, the only contracts of the Roman law that were termed bilateral, or synallagmatic, or reciprocal: that is, binding the parties *mutually* (*ultra-citroque*), every other form of contract being unilateral, *i.e.*, binding one party only, and requiring to be repeated in the reverse form in order to bind the other, as in the *stipulatio*.

[The historical development of the forms of contract is treated in the ninth chapter of Maine's *Ancient Law*. The class of real contracts, comprising loan (*mutuum*), pledge (*pignus*), and deposit (*depositum*), is there placed in order of time between the literal and the consensual contracts, the links in the chain being: (1) *nexum*, (2) *stipulatio*, and (3) *literal*, (4) *real*, (5) *consensual* contracts.]

§ 470. The sale being at last permitted by mutual consent, its elements were the same as at the common law, with the exceptions now to be considered.

1st. The price was to be *certain*, either absolutely or in a manner that could be determined, as for *centum aureos*; or for what it cost you, *quantum tu id emisti*; or for what

⁵ Pro Roscio, 3, § 2.

⁶ Gaius thus complains: "Nam qui tunc jura condiderunt, eo res perducta est ut vel qui minimum errasset, litem pederet." — L. 4, § 30.

money I have in my coffer, *quantum pretii in arca habeo*.¹

The common law rule, that in the absence of express [*360] *agreement a reasonable price is implied, did not exist in the Roman law.

§ 471. 2dly. It was a received maxim in the Roman law that the vendor did not bind himself to transfer to the buyer the property in the thing sold; his contract was not *rem dare* but *præstare emptori rem habere licere*. The texts abound in support of this statement. “Qui vendidit, necesse non habet fundum emptoris facere,” unless he made a special and unusual stipulation to that effect, for the text goes on to say, “ut cogitur qui fundum stipulanti spondit.”¹ If the vendor was owner, the property passed by virtue of his promise to guarantee possession and enjoyment, but if not, the sale was still a good one, and its effect was simply to bind the vendor to indemnify the buyer, if the latter was “evicted,” that is, dispossessed *judicially* at the suit of the true owner. Ulpian’s explanation is entirely lucid. “Et in primis ipsam rem præstare venditorem oportet, id est, tradere. Quæ res, si quidem dominus fuit venditor, facit et emptorem dominum; si non fuit, tantum evictionis nomine venditorem obligat, si modo pretium est numeratum, aut eo nomine satisfactum.”² It resulted, therefore, that on the completion of a contract of sale, the vendor was bound simply to deliver possession, and the buyer had no right to object that the vendor was not owner. But the possession thus to be transferred, was something more than the mere manual delivery, and the Romans had a special term for it: it must be *vacua possessio*, a free and undisturbed possession, not in contest when delivered; “*vacua possessio emptori tradita non intelligitur, si alius in ea, legatorum fidei commissorum servandorum causa in possessione sit: aut creditores possideant. Idem dicendum est si venter in possessione sit. Nam et ad hoc pertinet Vacui appellatio.*”³ And if the vendor knew that he was not the owner and made a sale

¹ Dig. 18, 1, De Contrah. Empt.
7, §§ 1 & 2.

¹ Dig. 18, 1, 25, § 1, Ulp.

² Dig. 19, 1, 11, § 1, Ulp.

³ Dig. 19, 1, 2, § 1, Paulus.

to a buyer ignorant of that fact, so as wilfully to expose the latter to the danger of eviction, the vendor's conduct was deemed fraudulent, and the buyer was *author- [*361] ized to bring an equitable suit, *Ex Empto*, without waiting for the eviction. "Si sciens alienam rem ignoranti mihi vendideris, etiam priusquam evincatur, utiliter⁴ me Ex Empto acturum putavit [Africanus] in id, quanti meâ intersit, meam esse factam. Quamvis enim alioquin verum sit, venditorem hactenus teneri ut rem emptori habere liceat, non etiam ut ejus faciat; quia tamen dolum malum abesse præstare debeat, teneri eum, qui sciens alienam, non suam, ignoranti vendidit."⁵

§ 472. The eviction against which the vendor was bound to warrant the buyer, was the actual dispossession effected by means of a judgment in an action by a third person, and it was not enough that judgment was rendered if not executed. In Pothier's edition of the Pandects, he thus states the rule and cites a response of Gaius: — "Cum ea res evicta dicatur, quæ per judicem ablata est, hinc non videbitur evicta, si condemnatio exitum non habuit, et adhuc rem habere liceat. Exemplum affert Gaius. Habere licere rem videtur emptor, et si is qui emptorem in evictione rei vicerit, ante ablatam vel abductam rem sine successore decesserit, ita ut neque ad fiscum bona peruenire possint, neque privatim a creditoribus distrahi, tunc enim nulla competit emptori ex stipulatu actio, quia rem habere ei licet. L. 57, Gaius, lib. 2 ad Ed. Ædil.-Curul."¹

⁴ Utiliter, that is, in equity, before the Prætor.

⁵ Dig. 19, 1. 30, § 1. The text may be thus translated for the benefit of those not familiar with the technical terms of the Roman law: — "If you, knowing a thing to be another's, sell it to me, who am ignorant of the fact, Africanus was of opinion that even before eviction, an equitable suit *ex empto* might be maintained by me for damages (literally, for as much interest as I had, that the thing should become mine). For, although, it would otherwise be

true that the vendor is only bound to guaranty possession to the buyer, not, also, that the thing should become the buyer's, yet because he ought also to warrant the absence of fraud, a man is held responsible who, knowing the thing to be another's, not his own, has sold it to one ignorant of that fact."

¹ Pothier, Pandectæ Justinianæ, lib. 21, tit. 2, De Evict. Pars 2, No. XII. So strict was the rule, that the buyer had no remedy if evicted under the sentence of an arbitrator, or by compromise. — Ib. No. XVI.

§ 473. The evicted purchaser had two actions, one [*362] *Ex Empto*, * which was the *actio directa*, resulting from the very nature of the contract, and in which the recovery was for damages consisting of the value of the thing at the *date of eviction*, and any expenses incurred in relation to it, the true principle in this action being to restore the buyer to the condition in which he would have been, not if he had never bought, but if he had not been dispossessed.¹

§ 474. The second action was *De Stipulatione duplæ*, and arose out of a custom of stipulating that the buyer, in case of eviction, should receive, as an indemnity, double the price given. This stipulation became so general, that under an *Edictum Ædilium-Curulium*, it was considered to be implied in all sales, unless expressly excluded: *Quia assidua est Duplæ stipulatio, idcirco placuit ex Empto agi posse si duplam venditor Mancipii non caveat. EA ENIM QUÆ SUNT MORIS ET CONSUETUDINIS, IN BONÆ FIDEI JUDICIIS DEBENT VENIRE.*"¹ The whole of the second title of the 21st Book of the Digest is devoted to this subject, *De Evictionibus et Duplæ Stipulatione*.

§ 475. In consequence of the peculiar obligations of the vendor as warrantor against eviction, he was called the *auctor*, who was bound *auctoritatem præstare*, to make good his warranty; and the form of procedure was, that whenever the buyer was sued by a person claiming superior title to the thing sold, it was his duty to cite his vendor, and make him party to the action, so to give him an opportunity of urging any available defence. This proceeding was termed *litem denuntiare*; or *auctorem laudare*; *auctorem interpellare*: and the buyer who failed to cite in warranty his vendor, without a legal excuse for his default, lost his remedy. "*Emptor fundi, nisi auctori aut heredi ejus denuntiaverit, evicto prædio, neque Ex stipulatu, neque Ex dupla, neque Ex*

¹ The texts are collected in Pothier, Pand. Just. lib. 19, tit. 1, ch. 1, Nos. 43 to 47, under the head—
"Quanti teneatur venditor emptori,

evictionis nomine, hac actione ex Empto."

¹ Dig. lib. 21, tit. 2, l. 31, § 20, Ulp. De Ædil. Edict.

empto actionem contra venditorem vel fidejussorem ejus habet.”¹

§ 476. *It would seem the natural consequence of [*363] these principles, that a vendor who did not even profess to transfer title, must necessarily suffer the loss, if the thing sold perished before delivery, on the maxim that *res perit domino*. But, on the contrary, the rule was explicitly laid down in conformity with ours at common law, as exemplified in *Rugg v. Minett*,¹ where the buyer of the turpentine was held bound to suffer the loss of the goods destroyed before delivery, on the ground that the ownership had vested in him. The reasoning by which this result was reached in the Roman law is thus explained by an eminent French jurist. After citing the text of the Institutes,² which is in these words: “Cum autem emptio et venditio contracta sit, quod effici diximus simul atque de pretio convenerit, cum sine scriptura res agitur, periculum rei venditæ statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit;” the commentator says: “Quels sont les effets de la vente? C’est de produire des obligations: le vendeur est obligé de livrer et de faire avoir la chose à l’acheteur. Eh bien! si depuis la vente il y a eu des fruits, des accroissements, il sera obligé de même de livrer et de faire avoir ces fruits, ces accroissements. (Dig. 19, 1, de Action. Empt. 13; §§ 10, 13 et 18, Ulp.) Si la chose a diminuée, s’est détériorée sans sa faute, il ne sera obligé de la livrer, de la faire avoir, qu’ainsi diminuée, ainsi détériorée; et si la chose a péri sans sa faute, son obligation aura cessé d’exister. Voilà tout ce que signifie cette maxime, que la chose, du moment de la vente, est aux risques de l’acheteur. C’est-à-dire que l’obligation du vendeur de livrer et de faire avoir, s’appliquera à la chose telle qu’elle se trouvera par suite des changements qu’elle aura pu éprouver. Il ne s’agit en tout ceci que de l’obligation du vendeur. Et s’il y a perte totale nous ne ferons qu’appliquer cette règle commune de l’extinction des obligations, que le débiteur d’un corps certain (*species*) est libéré,

¹ Code, tit. de Evic. et Dup. Stip.
l. 8.

¹ 11 East, 210, *ante*, 269.

² Inst. 3, 23, 3.

lorsque ce corps a péri sans son fait ou sans sa faute. (Dig. 45, 1, de Verb. Oblig. 23, Pomp.) Mais que devient-
[*364] dra l'obligation de l'acheteur relativement au * prix ?

Le prix convenu devra-t-il être augmenté ou diminué, selon que la chose aura reçu des accroissements, ou subi des détériorations ? En aucune manière ; le prix restera toujours le même. Et si la chose vendue a péri totalement, de sorte que la vendeur se trouve libéré de l'obligation de la livrer, l'acheteur le sera-t-il aussi de celle de payer le prix ? Pas davantage. Les deux obligations, une fois contractées, ont une existence indépendante : la première peut se modifier ou s'éteindre dans son objet, par les variations de la chose vendue — la seconde n'en continue pas moins de subsister, toujours la même. (Dig. 18, 5, de Rescind. Vend. 5, § 2.) Tel était le système Romain — et c'est pour cela qu'il est vrai de dire que du moment de la vente, l'acheteur court les risques de la chose vendue, bien que le vendeur en soit encore propriétaire.”³

§ 477. But although the risk of loss before the delivery was thus imposed on the buyer, it was on condition that the vendor should be guilty of no default in taking care of the thing till he transferred it into the buyer's possession, for an accessory obligation of the vendor was *præstare custodiam*. “Et sane periculum rei ad emptorem pertinet dummodo custodiam venditor ante traditionem præstet.”¹

§ 478. Such were the leading principles of the Roman law as to the effect of sale in passing title, and such was the law of the continent of Europe wherever based on the civil law, till the adoption and spread of the Code Napoleon, first among the Latin races, and more recently among the nations of Central and Northern Europe. The French code says in a few emphatic words, “La vente de la chose d'autrui est nulle,” Art. 1599, and would thus seem to have swept away at once the entire doctrine dependent upon the Roman system, which was based on a principle exactly the reverse. But unfortunately the definitions of the nature and form of the

³ Ortolan, Explic. Hist. des Inst., tome 3, p. 282.

¹ Dig. 47, 2, de Furtis, 14, Ulp.

contract in the Arts. 1582 and 1583, gave some countenance to the idea that such was not the intention of the authors. Instead * of defining a sale to be a transfer [*365] of the property or ownership, the language is, in Art. 1582: “La vente est une convention par laquelle l’un s’oblige à *livrer* une chose, et l’autre à la payer;” and in 1583: “Elle est parfaite entre les parties, et la propriété est acquise de droit à l’acheteur, *à l’égard du vendeur*, dès qu’on est convenue de la chose et du prix, quoique la chose n’ait pas encore été livrée ni le prix payé.” The consequence of this almost literal adoption of the texts of the Roman law was, that not only an eminent jurist, but the Court of Cassation itself will be found to furnish authority for the position that a sale transfers only a right of possession, not a title of ownership. Toullier, one of the most accredited commentators, is of this opinion,¹ and there is a decision of the highest court in France in conformity with it.² But this view seems to be now exploded, and all the recent writers, including such great authorities as Duranton, Zachariæ, and Troplong, insist that the modern idea of the transfer of ownership is what was really intended by the authors of the civil code.³ M. Fréméry gives the following clear exposition of the origin of the difficulty, and adds his authority to that of the great body of French jurists in support of the position that the modern civil law is on this point opposite to that of the *Corpus Juris Civilis*:—

§ 479. “The fragments preserved in the Digest conclusively prove that custom had consecrated at Rome a habitual formula for contracts of sale, subject to special clauses, which were to be added to suit the circumstances. According to this formula, it was the vendor who spoke, *legem dicibat*. It was customary according to this formula for the vendor, in expressing the engagements which he agreed to assume, to use these words: *præstare emptori rem habere licere*;

¹ Tome 14, No. 240 *et seq.*

² Sirey, 32, 1, 623.

³ Favart, V^o Vente; Duranton, t. 16, No. 18; Troplong, Vente, tit. 1, Nos. 4 *et seq.*; tit. 2, add. au même

No.; Duvergier, tit. 1, Nos. 10 *et seq.*; Championnière et Rigaud, Dr. d’Enreg. t. 3, No. 1745; Zachariæ, t. 2, § 349.

terms which, strictly construed, are not as wide in [*366] their import as the words *rem dare*. * The jurists decided on this state of facts that every ambiguous clause was to be interpreted against the vendor, whose fault it was, not to have expressed himself more clearly. They further decide that he was not bound to transfer ownership.

§ 480. “Justinian inserted these decisions in his Digest, and made them the law; so that, deriving their authority from legislation, and not from the special circumstances of fact, on which the juris consults had reasoned, they became applicable to every contract of sale by its nature, as recognized by the law. If, then, the old formula is abandoned, and the vendor uses the words, *rem dare*, and no longer *rem habere licere*, how can one explain a law which declares that the vendor does not bind himself to transfer the ownership? And if, using neither locution, he simply says, ‘I sell,’ and leaves it to usage to determine the meaning which it has attached to these words, what is to be done if it be manifest that all who use these words attach to them the idea that the vendor binds himself to transfer the ownership?

“This is precisely what has happened. For many centuries it has been taught in our schools that it is of the nature of the contract of sale that the vendor is not bound to make the purchaser the owner of the thing sold: *ipse dixit!* And yet for many centuries also, the words ‘I sell,’ are no longer paraphrased by the Roman formula which determined their meaning; the man who utters them or hears them, understands unhesitatingly that he who sells is to make the purchaser owner of the thing sold; and every one is asking how it is that by the nature of the contract of sale, the vendor is not bound to transfer the ownership to the purchaser?

§ 481. “Since the Civil Code has appeared, however, and has declared in the Art. 1599, ‘The sale of another’s things is null,’ many persons have inferred that this must be because the two parties have the intention, one of transferring, the other of acquiring, the property in the thing sold: so that the nature of the contract of sale, which, according to the

Roman law, did not impose on the vendor the obligation of transferring the ownership to the purchaser, does, on the contrary, * according to the French law, comprehend this obligation.”¹

§ 482. In Scotland the property in goods never passes until delivery, and the law was stated by Lord President Inglis in December, 1867, in the case of *Black v. Bakers of Glasgow*,¹ as follows: “There could be no stoppage *in transitu* in this case, simply because the goods never were in a state of *transitus*. No law, either in England or Scotland, gives any real countenance to the idea that the state of *transitus* to which the equitable remedy of stoppage applies, is any thing but an actual state of transit from the seller to the buyer. Unless the seller has parted with the possession his remedy is not stoppage *in transitu*, but in Scotland *retention*, and in England an exercise of the seller’s right of lien. I should think it almost unnecessary, at this time of day, to point out the important distinctions which exist between the laws of Scotland and England, as regards the seller’s rights in goods sold and not delivered. The seller of goods in Scotland (notwithstanding the personal contract of sale) *remains the undivested owner of the goods, whether the price be paid or not, provided the goods be not delivered; and the property of the goods cannot pass without delivery, actual or constructive; the necessary consequence is, that the seller can never be asked to part with the goods until the price be paid. Nay, he is entitled to retain them against the buyer and his assignees, till every debt due and payable to him by the buyer is paid or satisfied.* The seller’s right of retention thus being grounded on an undivested right of property, cannot possibly be of the nature of a lien, for one can have a lien only over the property of another. In England, on the other hand, the property of the goods passes to the buyer by the personal contract of sale, and the seller’s rights thereafter, in relation to the undelivered subject of sale (whatever else they may be), cannot be the rights of an undivested owner. English

¹ Fréméry, *Etudes du Droit Commercial*, p. 5.

¹ 40 Jurist, 77; 6 Court Sess. Cas. (3d Ser.), at p. 140.

jurists are not agreed as to the true foundation in principle of the seller's lien. I shall only say, that if it be not [*368] an *equitable remedy like stoppage *in transitu*, it is certainly not the assertion of a legal right of ownership like the right of *retention* in Scotland."²

In *Couston v. Chapman*³ will be found an exposition of the difference between the law of England and that of Scotland in a sale by sample.

² The difference between the English and the Scotch law is also stated by Lord Blackburn in *M'Bain v. Wallace*, 6 App. Cas. at p. 608.

³ L. R. 2 Sc. App. 250.

* BOOK III.
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A VOIDANCE OF THE CONTRACT.

CHAPTER I.

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§ 483. It has already been shown that a party who has given an apparent assent to a contract of sale, may refuse to execute it if the assent was founded on a mistake of a material fact, such as the subject matter of the sale, the price, and in some instances, the identity of the other contracting

party.¹ The contract in such case has never come into existence for want of a valid assent. We enter now on the consideration of cases where the contract has been carried into effect under a continuance of mistake, and when the party who contracted through error is no longer passive, declining to execute, but active, seeking to set it aside.²

¹ *Ante*, pp. 56 *et seq.*

Rescission for mistake.—A contract made under mistake as to material fact may be rescinded by the party sought to be charged upon discovery of mistake, he being guilty of no want of diligence in not ascertaining what the real facts were. *Wheat v. Cross*, 31 Md. 99, 104; *s. c.* 1 Am. Rep. 28, 30; *Fullerton v. Dalton*, 58 Barb. (N. Y.) 236, 239; *Ketchum v. Catlin*, 21 Vt. 191, 194; *Doggett v. Emerson*, 3 Story C. C. 700, 732. And there is no difference in principle between the rescission of contracts to be performed and the rescission of a contract, which is itself the rescission of another and existing contract. *Byers v. Chapin*, 28 Ohio St. 300. But a mutual mistake as to fact wholly collateral, and not effecting the essence of the contract, will not invalidate it. *Wheat v. Cross*, 31 Md. 991; *s. c.* 1 Am. Rep. 28.

Mistake as to price.—A mutual mistake as to the price of the article avoids the sale, and neither party will be bound, because there was no meeting of their minds. *Wilkinson v. Williamson*, 76 Ala. 163, 168; *Rupley v. Dagget*, 74 Ill. 351; *Armstrong Furnishing Co. v. Kosure*, 66 Ind. 545; *Fear v. Jones*, 6 Iowa, 169, 173; *Harvey v. Harris*, 112 Mass. 32; *Hills v. Snell*, 104 Mass. 173; *s. c.* 6 Am. Rep. 216.

Mistake as to quantity will entitle the buyer to recover back any excess of the price, which he may have paid under the misapprehension. *Harvey v. Harris*, 112 Mass. 32, 37; *Gardner v. Lane*, 91 Mass. (9 Allen) 492, 500; *Megaw v. Molloy*, L. R. 2 Ir. 530; *Scott v. Littledale*, 8 El. & Bl. 813.

Mistake as to quality of particular articles, whose kind or description has been ascertained, will not entitle the vendor to repudiate the sale. *Harvey v. Harris*, 112 Mass. 32, 37; *Gardner v. Lane*, 91 Mass. (9 Allen) 492, 500; *Megaw v. Molloy*, L. R. 2 Ir. 530; *Scott v. Littledale*, 8 El. & Bl. 813. And the buyer cannot avoid his contract on the ground of mistake of fact by showing that he was mistaken as to the quality of the thing sold. *Wheat v. Cross*, 31 Md. 99; *s. c.* 1 Am. Rep. 28; but see *Gardner v. Lane*, 91 Mass. (9 Allen) 492.

Mistake as to identity.—Where there is a mistake as to the identity of the article sold, and not merely as to the quality of such article, as where the seller refers to one article and the buyer to another, there is no meeting of minds and the contract the party sought to make fails of effect. *Barfield v. Price*, 40 Cal. 535, 542; *Montgomery Co. v. American Emigrant Co.*, 47 Iowa, 91; *Fear v. Jones*, 6 Iowa, 169, 73; *Harvey v. Harris*, 112 Mass. 32; *Hills v. Snell*, 104 Mass. 173; *s. c.* 6 Am. Rep. 216; *Kyle v. Kavanagh*, 103 Mass. 356; *s. c.* 4 Am. Rep. 560; *Gardner v. Lane*, 91 Mass. (9 Allen) 492, 499; *s. c.* 85 Am. Dec. 779; *Chapman v. Cole*, 78 Mass. (12 Gray) 141; *s. c.* 71 Am. Dec. 739; *Rice v. Dwight Manuf. Co.*, 56 Mass. (2 Cush.) 80, 83; *McGoren v. Avery*, 37 Mich. 120; *Cutts v. Guild*, 57 N. Y. 229; *Fullerton v. Dalton*, 58 Barb. (N. Y.) 236; *Sheldon v. Capron*, 3 R. I. 171; *Thornton v. Kempster*, 5 Taunt. 786, 788.

² See *Wheat v. Cross*, 31 Md. 99, 104; *Gardner v. Lane*, 91 Mass. (9 Allen) 291, 499; *Chapman v. Cole*,

* [By sect. 34, subs. 3 of the Judicature Act, 1873, [*370] the rectification, setting aside, and cancellation of deeds or other written instruments, are assigned to the Chancery Division of the High Court. But when such relief is claimed *by way of defence* to an action brought in one of the Common Law Divisions, the Courts of those Divisions have jurisdiction to give effect to the equity at least for the purpose, and to the extent of determining the action,³ and the mere fact that a counter-claim in an action seeks for ratification of a deed and specific performance of an agreement is not a sufficient ground for having the action transferred to the Chancery Division.⁴ It has not been determined whether the Common Law Divisions have power on such a counter-claim to grant substantive relief.]

§ 484. The mistake alleged as a reason for avoiding a contract may be that of both parties, or of one alone; it may be a mistake of law or of fact; and when the mistake is that of one party alone, that fact may be known or unknown to the other contracting party.

§ 485. When there has been a common mistake as to some essential fact, forming an inducement to the sale, that is, when the circumstances justify the inference that no contract would have been made if the whole truth had been known to the parties, the sale is voidable. If either party has performed his part during the continuance of the mistake, he may set aside the sale on discovering the truth, unless he has done something to render impossible a *restitutio in integrum* of the other side, a restoration to the condition in which he was before the contract was made. If that be not possible the deceived party must be content with a compensation in damages.¹ And this rule is applicable to cases even where

78 Mass. (12 Gray) 141; s. c. 71 Am. Dec. 739; *Megaw v. Molloy*, L. R. 2 Ir. 539; *Gardiner v. Tate*, Ir. R. 10 C. L. 460.

³ *Mostyn v. West Mostyn Coal Co.*, 1 C. P. D. 145.

⁴ *Storey v. Waddle*, 4 Q. B. D. 289, C. A.; but see *Holloway v. York*, 2 Ex. D. 333, C. A.

¹ See *Pacific Guano Co. v. Mullen*, 66 Ala. 582; *Mahone v. Reeves*, 11 Ala. 345; *Newell v. Turner*, 9 Port. (Ala.) 420; *Herman v. Haffenegger*, 54 Cal. 161; *Sanford v. Dodd*, 2 Day (Conn.) 437; *The Armstrong Furniture Co. v. Kosure*, 66 Ind. 545; *Hess v. Young*, 59 Ind. 379; *Haase v. Mitchell*, 58 Ind. 213; *Dill*

v. O'Ferrell, 45 Ind. 268; *Howard v. Cadwalader*, 5 Blackf. (Ind.) 225; *Montgomery Co. v. American Emigrant Co.*, 47 Iowa, 91; *Bacon v. Brown*, 4 Bibb (Ky.) 91; *Tisdale v. Buckmore*, 33 Me. 461; *Potter v. Titcomb*, 22 Me. 300; *Hoopes v. Strasburger*, 37 Md. 390; *Brewster v. Burnett*, 125 Mass. 68; *Bassett v. Brown*, 105 Mass. 551, 558, 559; s. c. 28 Am. Rep. 203; *Bartlett v. Drake*, 100 Mass. 176; s. c. 1 Am. Rep. 101; *Morse v. Brackett*, 98 Mass. 205; s. c. 104 Mass. 494; *Conner v. Henderson*, 15 Mass. 319; s. c. 8 Am. Dec. 103; *Kimball v. Cunningham*, 4 Mass. 502; s. c. 3 Am. Dec. 230; *Martin v. Roberts*, 59 Mass. (5 Cush.) 126; *Dorr v. Fisher*, 55 Mass. (1 Cush.) 271, 274; *Thayer v. Turner*, 49 Mass. (8 Metc.) 550; *Stevens v. Austin*, 42 Mass. (1 Metc.) 557; *Coolidge v. Brigham*, 42 Mass. (1 Metc.) 547; *Perley v. Balch*, 40 Mass. (23 Pick.) 238; s. c. 34 Am. Dec. 56; *Thurston v. Blanchard*, 39 Mass. (22 Pick.) 18; s. c. 33 Am. Dec. 700; *Getchell v. Chase*, 37 N. H. 110; *Cook v. Gilman*, 34 N. H. 556; *Webb v. Stone*, 24 N. H. 282; *Luey v. Bundy*, 9 N. H. 298; s. c. 32 Am. Dec. 359; *Wiggin v. Foss*, 4 N. H. 294; *Shepherd v. Temple*, 3 N. H. 455; *Wooster v. Sage*, 67 N. Y. 67; *Holtz v. Schmidt*, 59 N. Y. 253; *Moyer v. Shoemaker*, 5 Barb. (N. Y.) 319; *Royce v. Watrous*, 7 Daly (N. Y.) 87; *Masson v. Bovet*, 1 Den. (N. Y.) 74; s. c. 43 Am. Dec. 651; *Johnson v. Titus*, 2 Hill (N. Y.) 606; *Burton v. Stewart*, 3 Wend. (N. Y.) 236; s. c. 20 Am. Dec. 692; *Reed v. McGrew*, 5 Ohio, 386; *Babcock v. Case*, 61 Pa. St. 427; *Smith v. Smith*, 30 Vt. 139; *Hammond v. Buckmaster*, 22 Vt. 375; *Fay v. Oliver*, 20 Vt. 78; s. c. 49 Am. Dec. 764; *Allen v. Edgerton*, 3 Vt. 442; *Lyon v. Bertram*, 61 U. S. (20 How.) 149; bk. 15, L. ed. 327; *Hunt v. Silk*, 5 East, 449; *Sully v. Fearn*, 10 Ex. 535; *Blackburn v. Smith*, 2 Ex. 783; *Clarke v. Dickson*, El. Bl. & El. 148; s. c. 27 L. J. Q. B. 223; *Savage v.*

Canning, 16 W. R. 133; Ir. R. 1 C. L. 434. For exceptions to the general rule, see *Boody v. McKenney*, 23 Me. 517; *Bartlett v. Drake*, 100 Mass. 176; s. c. 1 Am. Rep. 101; *Chandler v. Simmons*, 97 Mass. 508, 514; *Bartlett v. Cowles*, 81 Mass. (15 Gray) 445; *Gibson v. Soper*, 72 Mass. (6 Gray) 279; s. c. 66 Am. Dec. 414.

Rescission and restoration. — On rescission of a contract, because of mutual mistake of the parties, for any of the reasons enumerated in footnote 1, *supra*, there must be a complete restoration of the property purchased or of the price paid, before there can be a rescission of the contract. *Bishop v. Stewart*, 13 Nev. 25, 41. See *Barnett v. Stanton*, 2 Ala. 189; *Ogburn v. Ogburn*, 3 Port. (Ala.) 129; *State v. McCauley*, 15 Cal. 458; *Jennings v. Gage*, 13 Ill. 612; s. c. 56 Am. Dec. 476; *Vance v. Schroyer*, 79 Ind. 380; *Hess v. Young*, 59 Ind. 379; *Dill v. O'Ferrell*, 45 Ind. 268; *Hendrickson v. Hendrickson*, 51 Iowa, 68; *Bain v. Wilson*, 1 J. J. Marsh. (Ky.) 203; *Tisdale v. Buckmore*, 33 Me. 461; *Brewster v. Burnett*, 125 Mass. 68; s. c. 28 Am. Rep. 203; *Bassett v. Brown*, 5 Mass. 551, 558; *Morse v. Brackett*, 98 Mass. 207; *Bryant v. Isburg*, 79 Mass. (13 Gray) 607; *Thayer v. Turner*, 49 Mass. (8 Metc.) 550; *Clark v. Baker*, 46 Mass. (5 Metc.) 461; *Coolidge v. Bingham*, 42 Mass. (1 Metc.) 547; *Perley v. Balch*, 40 Mass. (23 Pick.) 285; s. c. 34 Am. Dec. 56; *Jewett v. Petit*, 5 Mich. 512; *Haase v. Nonnemacher*, 21 Minn. 486; *Cocke v. Rucks*, 34 Miss. 105; *Minor v. Kelly*, 5 T. B. Mon. (Ky.) 272; *Sumner v. Parker*, 36 N. H. 454; *Cook v. Gilman*, 34 N. H. 556, 560; *Webb v. Stone*, 24 N. H. 288; *Utter v. Stuart*, 30 Barb. (N. Y.) 20; *Royce v. Watrous*, 7 Daly (N. Y.) 87; affirmed, 73 N. Y. 597; *Masson v. Bovete*, 1 Den. (N. Y.) 69; s. c. 43 Am. Dec. 651; *Stoddard v. Graham*, 23 How. (N. Y.) Pr. 518; *Reed v. McGraw*, 5 Ohio, 386; *Carter*

the mistake of the complaining party was caused by the fraud of the other.²

§ 486. *In *Strickland v. Turner*,¹ the sale was of [*371] an annuity, dependent on a life that had ceased without the knowledge of either party, and the purchaser paid his money. Held, that he could recover it back as money had and received.

v. Walker, 2 Rich. (S. C.) 46; *Smith v. Smith*, 30 Vt. 139; *Hammond v. Buckmaster*, 22 Vt. 375; *Hendricks v. Goodrich*, 15 Wis. 679; *Gay v. Alter*, 102 U. S. (12 Otto) 79; bk. 26, L. ed. 48; *Grymes v. Sanders*, 93 U. S. (3 Otto) 55, 62; bk. 23, L. ed. 798; *Lyon v. Bertram*, 61 U. S. (20 How.) 149, 154; bk. 15, L. ed. 327; *Christy v. Cummings*, 3 McL. C. C. 386; *Hunt v. Silk*, 5 East, 449; *Auger v. Thompson*, 3 Ont. App. 19. The rescission must be made within the reasonable time after the mistake is discovered. *Wolf v. Dietzsch*, 75 Ill. 205; *Johnson v. McLane*, 7 Blackf. (Ind.) 501. But what is a reasonable time always depends upon the circumstances surrounding each particular case. *Marston v. Simpson*, 54 Cal. 189; *Grymes v. Sanders*, 93 U. S. (3 Otto) 55, 62; bk. 23, L. ed. 798. Where the party, desiring to rescind, has changed the condition of the property, before learning of any mistake or fraud in the sale of it, cannot have his remedy by rescission. *Smith v. Bittenham*, 98 Ill. 188. See, also, *Wolf v. Dietzsch*, 75 Ill. 205; *Buchanan v. Horney*, 12 Ill. 338. Where H., the owner of chattels, relying on the representations of R. that he was the agent of L., agreed to sell the same to L. on credit, and H. in the belief that R. was such agent, delivered the chattels to him, when in fact he was not such agent, nor had he authority to purchase for L., it was held that the property in the chattels did not pass from H., and that L., who bought the chattels of R. and converted them to his own

use without knowledge of the fraud, was liable to H. for their value; and the fact that R. at the time the chattels were delivered to him had paid H. part of the price agreed on, was held to make no difference except as to the amount of recovery against L. *Hamet v. Letcher*, 37 Ohio St. 356; s. c. 41 Am. Rep. 519. The court say that it was not a contract voidable merely, but an agreement wholly void; and that "under the circumstances, the hogs never passed to Hamet." Hence, applying the maxim that no one can transfer a greater right or better title than he himself possesses (*Roland v. Gundy*, 5 Ohio, 202), it necessarily follows that *Letcher & Co.* are liable as for a conversion. *Fawcett v. Osborn*, 32 Ill. 411; *Moody v. Blake*, 117 Mass. 23; s. c. 19 Am. Rep. 394; *Saltus v. Everett*, 20 Wend. (N. Y.) 267; s. c. 32 Am. Dec. 541; *Barker v. Dinsmore*, 72 Pa. St. 427; s. c. 13 Am. Rep. 697; *Fowler v. Hollins*, L. R. 7 Q. B. 616; *Cundy v. Lindsay*, 3 App. Cas. 459; *In re Reed*, 3 Ch. Div. 123; *Hardman v. Booth*, 1 Hurls. & N. 803; *Kingsford v. Merry*, 1 Hurls. & N. 503; *Higsons v. Burton*, 26 L. J. Ex. 342; *Lickbarrow v. Mason*, 6 T. R. 131; s. c. 1 Smith's L. C. pt. 2, p. 1195.

² *Hunt v. Silk*, 5 East, 449; *Blackburn v. Smith*, 2 Ex. 783; *Sully v. Fearn*, 10 Ex. 535; *Clarke v. Dickson*, E. B. & E. 148; 27 L. J. Q. B. 223; *Savage v. Canning*, 16 W. R. 133; 1 Ir. C. L. R. 434. And see next chapter.

¹ 7 Ex. 208. See a similar case

In *Cox v. Prentice*,² the plaintiff bought a bar of silver, and by agreement it was sent to an expert to be assayed, and on his report of the quantity of silver contained in the bar, the plaintiff paid for it. There was a mistake in the assay, and the quantity of silver was much less than was stated in the report. Held to be a common mistake, and that the plaintiff, on offer to return the bar, could recover the price paid in *assumpsit*, Lord Ellenborough saying, it was just as if an article is sold by weight, and there is an accidental misreckoning of the weight.

§ 487. The case of *Boulton v. Jones*,¹ was a very singular case of mutual mistake, and is well worth consideration. The facts have already been stated at length (*ante*, p. 61), and were substantially these:—One Brocklehurst kept a shop. He owed money to the defendant Jones. One day he sold out his shop and business to the plaintiff Boulton. On the same day, Jones, ignorant of this sale, sent a written order for goods to the shop, addressed to Brocklehurst, and Boulton supplied them. Jones consumed the goods, still ignorant that they were supplied by Boulton, and when payment was asked for, declined on the ground that he had a set-off against Brocklehurst, with whom *alone* he had assented to deal. The action was for goods sold, and the Court held that there was no contract by Jones with the plaintiff, and that inasmuch as he had a set-off against Brocklehurst, the mistake as to the person was sufficient to entitle him to refuse payment.² So far the case was in accordance [*372] with the rule laid down by Gibbs C. J. in **Mitchell*

in equity. *Cochrane v. Willis*, 1 Ch. 58.

² 3 M. & S. 344.

¹ 2 H. & N. 564; 27 L. J. Ex. 117, followed in the American case of *The Boston Ice Co. v. Potter*, 123 Mass. 28, *ante*, p. 62. See a criticism on the remarks in the text in *Pollock on Contracts*, Appendix E. p. 457 (2d ed.). The note is omitted in the 3d edition; see, however, note at p. 436 of that edition.

² The same doctrine is held in this

country. See *Boston Ice Co. v. Potter*, 123 Mass. 28; s. c. 25 Am. Rep. 9; *Moody v. Blake*, 117 Mass. 23; *Winchester v. Howard*, 97 Mass. 303; *Mudge v. Oliver*, 83 Mass. (1 Allen) 74; *Orcutt v. Nelson*, 67 Mass. (1 Gray) 536, 542; *Gregory v. Wendell*, 40 Mich. 432, 443; *Randolph Iron Co. v. Elliott*, 34 N. J. L. (5 Vr.) 184; *Barker v. Dinsmore*, 72 Pa. St. 427; s. c. 13 Am. Rep. 697; *Decan v. Shipper*, 35 Pa. St. 239; s. c. 78 Am. Dec. 334; *Hamet v.*

*v. Lepage*⁸ (not cited in *Boulton v. Jones*), and the plaintiff could not be permitted to recover. But on the principles governing contracts in general, it is submitted that the plaintiff was not wholly without remedy. For aught that appears in the report, there was a clear case of mutual mistake. The plaintiff who had just bought out the shop and business of Brocklehurst, did nothing wrong, nothing out of the usual course of trade in supplying goods on a written order sent by a customer to a shop, addressed to the man whose business he had just bought, and in ignorance of the fact that it could be at all material to the buyer whether the goods were supplied by himself or by his predecessor in business. Plaintiff's mistake was his ignorance that the defendant wished to buy *quâ* creditor of Brocklehurst, so as to pay for the goods by a set-off. Defendant's mistake was in consuming the goods of the plaintiff, in the belief that they were the goods of Brocklehurst. It can hardly be doubted that if the goods had not been consumed before the discovery of the mistake, the defendant would have been bound on demand to return the goods if he did not choose to pay for them. The very basis of the decision was that there had been *no contract* between the parties, and if so, on no conceivable ground could the defendant have kept without payment another man's goods sent to his house by mistake. The consumption of the goods prevented the possibility of a simple avoidance of the contract on the ground of mutual mistake. That mistake was in relation to the *mode of payment*. The vendor thought he was to be paid in money: the buyer intended to pay in his claim against Brocklehurst. The real question under the circumstances then was this: Is the buyer to pay as *he* intended, or as the *vendor* intended? for both had intended that the property in the goods should pass, at the price fixed in the invoice. Now, in determining this, was the real dispute, a controlling circumstance is that the buyer was wholly blameless, whereas the seller had been guilty of some slight negligence. If the seller had sent an

Letcher, 37 Ohio St. 356; s. c. 41
Am. Rep. 519; Dean *v. Yates*, 22
Ohio St. 388.

⁸ Holt, N. P. 253.

invoice or bill of parcels with the goods, showing [*373] that *he* * was the vendor, the buyer would have been at once informed of the mistake, and might have rejected the goods; but the vendor delayed sending his invoice till the goods were consumed. The true result therefore of the whole transaction, it is submitted, is in principle this, that the buyer was bound to pay for the goods in the manner in which he had assented to pay, and the vendor was bound to accept payment in that mode. The buyer was therefore responsible, not at law (for courts of law have no means nor machinery for reforming contracts nor rendering conditional judgments), but in equity, either to make an equitable assignment to the vendor of his claim against Brocklehurst for an amount equivalent to the price, or to become trustee for the seller in recovering the claim against Brocklehurst. He would have no right to retain the whole of his claim against Brocklehurst while refusing to pay for the goods.⁴ The case is manifestly quite distinct from that of a mutual mistake, where a party has consumed what he did not intend to buy. If A. sends a case of wine to B., intending to sell it, but fails to communicate his intention, and B., honestly believing it to be a gift, consumes it, there is no ground for holding B. to be responsible for the price, either in law or equity, if he be blameless for the mistake.

§ 488. Where the mistake is that of one party only to the contract, and is not made known to the other, the party laboring under the mistake must bear the consequences, in the absence of any fraud or warranty. If A. and B. contract for the sale of the cargo *per* ship "Peerless," and there be two ships of that name, and A. mean one ship and B. intend the other there is no contract.¹ But if there be but one ship "Peerless," and A. sell the cargo of that ship to B., the latter would not be permitted to excuse himself on the ground that he had in his mind the ship "Peerness," and

⁴ See for illustration of equitable principles in such cases, *Harris v. Pepperell*, 5 Eq. 1.

¹ *Raffles v. Wichelhaus*, 2 H. & C. 906; 33 L. J. Ex. 160.

intended to contract for a cargo by this last-named ship. Men can only bargain by mutual communication, and if A.'s proposal were *unmistakable, as if it were [*374] made in writing, and B.'s answer was an unequivocal and unconditional acceptance, B. would be bound, however clearly he might afterwards make it appear that he was *thinking* of a different vessel.

For the rule of law is general, that whatever a man's *real* intention may be, if he *manifests* an intention to another party, so as to induce that other party to act upon it, he will be estopped from denying that the intention as *manifested* was his *real* intention.²

§ 489. When the mistake of one party is known to the other, then the question resolves itself generally into one of fraud,¹ which is the subject of the next chapter. In the case

² *Per* Lord Wensleydale, in *Freeman v. Cooke*, 2 Ex. 654; *Doe v. Oliver*, and cases collected in notes to it, 2 Sm. L. C. 775 (8th ed.); *Cornish v. Abington*, 4 H. & N. 549; 28 L. J. Ex. 262; *Alexander v. Worman*, 6 H. & N. 100; 30 L. J. Ex. 198; *Van Toll v. South Eastern Railway Co.*, 12 C. B. N. S. 75; 31 L. J. C. P. 241; *In re Bahia and San Francisco Railway Co.*, L. R. 3 Q. B. 584; *Carr v. London and North Western Railway Co.*, L. R. 10 C. P. 307 — *per* Brett J., at p. 316.

¹ *Mistake concerning person* is vital where personality is important. *Boston Ice Co. v. Potter*, 123 Mass. 28; s. c. 25 Am. Rep. 9; *Hills v. Snell*, 104 Mass. 173; s. c. 6 Am. Rep. 216; *Johnson v. Raylton*, L. R. 7 Q. B. Div. 438; *Boulton v. Jones*, 2 Hurls. & N. 564; *Dalton v. Hamilton*, 1 Hannay (N. B.) 422, 425, 426. Thus where one buys goods at a shop which has been occupied by a person who owes him, under the supposition that he is dealing with his debtor, he will be relieved from the contract, but if, on learning his mistake, he makes no objection, but retains the goods, he will be bound by the pur-

chase. *Mudge v. Oliver*, 83 Mass. (1 Allen) 74; but see *Orcutt v. Nelson*, 67 Mass. (1 Gray) 536, 542.

As to mistake of one not known to the other party, see *Stoddard v. Ham*, 129 Mass. 383; s. c. 37 Am. Rep. 369. See, also, *Daley v. Carney*, 117 Mass. 288; *Foster v. Ropes*, 111 Mass. 10, 16; *Wright v. Willis*, 84 Mass. (2 Allen) 191.

As to mistake of one known to the other of the parties to a contract, see *Winchester v. Howard*, 97 Mass. 303; *Huntington v. Knox*, 61 Mass. (7 Cush.) 371; *Holtz v. Schmidt*, 59 N. Y. 253; *Humble v. Hunter*, 12 Q. B. 311; s. c. 12 Ad. & El. N. S. 310; *Smith v. Drew*, 25 Grant (Ont.) 188. See *Clodfelter v. Hulett*, 72 Ind. 137, 143; *Smither v. Calvert*, 44 Ind. 242; *Rice v. Dwight Manuf. Co.*, 56 Mass. (2 Cush.) 80, 86; *Miller v. Lord*, 28 Mass. (11 Pick.) 11; *Fleetwood v. City of New York*, 2 Sandf. (N. Y.) 475; *Coleman v. Grubb*, 23 Pa. St. 393; *Clark v. Lillie*, 39 Vt. 405; *Railroad Co. v. Trimble*, 77 U. S. (10 Wall.) 367, 377; bk. 19, L. ed. 948; see, also, *Downs v. Donnelly*, 5 Ind. 496; *Gooding v. Morgan*, 37 Me. 419; *Norton v. Marden*, 15 Me.

just supposed of a ship "Peerless" and a ship "Peeress," there can be little doubt that if the vendor *knew* that the purchaser had a different ship in his mind from that intended by the vendor, there would be no contract, for by the rule of law just stated, the vendor would not be in a position to show that he had been *induced* to act by a manifestation of the buyer's intention different from his real intention. And if he not only knew the buyer's mistake, but caused it, his conduct would be fraudulent. But, as a general rule in sales, the vendor and purchaser deal at arms' length, each relying on his own skill and knowledge, and each at liberty to impose conditions or exact warranties before giving assent, and each taking upon himself all risks other than those arising from fraud, or from the causes against which he has fortified himself by exacting conditions or warranties. So that even if the vendor should know that the buyer was purchasing, for instance, cotton goods submitted to his inspection in the mistaken belief that they were made of linen, or if the purchaser should know that the vendor was [*375] selling a *valuable estate under the mistaken belief that a search for mines under it had proved unsuccessful, neither party could avoid the contract made under the supposed error or mistake. The exception to this rule exists only in cases where, from the relations between the parties, some special duty is incumbent on the one to make full and candid disclosure of all he knows on the subject to the other. This topic is more fully considered in the next Chapter on Fraud.

§ 490. The mistake which will justify a party in seeking

45; s. c. 32 Am. Dec. 132; Hill v. Green, 21 Mass. (4 Pick.) 114; Bean v. Jones, 8 N. H. 149; Wyman v. Farnsworth, 3 Barb. (N. Y.) 369; Clarke v. Dutcher, 9 Cow. (N. Y.) 674; Abell v. Douglass, 4 Den. (N. Y.) 305; Onondaga v. Briggs, 2 Den. (N. Y.) 26; Silliman v. Wing, 7 Hill (N. Y.) 159; Mowatt v. Wright, 1 Wend. (N. Y.) 355; s. c. 19 Am. Dec. 508; Ege v. Koontz, 3 Pa. St. 109; Colwell v. Peden, 3 Watts (Pa.)

327; Robinson v. Charleston, 2 Rich. (S. C.) 317; s. c. 45 Am. Dec. 739; Hubbard v. Martin, 8 Yerg. (Tenn.) 498; Dickins v. Jones, 6 Yerg. (Tenn.) 483; s. c. 27 Am. Dec. 488; Lee v. Stuart, 2 Leigh (Va.) 76; s. c. 21 Am. Dec. 599; Elliott v. Swartwout, 35 U. S. (10 Pet.) 137; bk. 9, L. ed. 373; East India Co. v. Tritton, 3 Barn. & Cr. 280, 290; Stevens v. Lynch, 12 East, 38; Platt v. Bromage, 24 L. J. Ex. 63.

to avoid his contract must be one of fact, not of law. The universal rule is *Ignorantia juris neminem excusat*.¹ The cases illustrating this maxim are very numerous, and only a small number of them will be found in the note.² But in *Wake v. Harrop*,³ it was held, both in the Exchequer of Pleas and in the Exchequer Chamber, that where a party had specially stipulated that he was acting only as agent for another, and had signed as such agent for his absent principal named in the signature, he was at liberty to show, by way of equitable defence, that the agreement which had been drawn up in such terms as to make him personally liable at law, was so written by mistake, that it did not express the real contract, and that he was not liable as principal. Some of the judges thought the plea a good defence, even at law, but this point not being raised, was not decided.

§ 491. In *Cooper v. Phibbs*,¹ Lord Westbury gave the following very lucid statement of the true meaning of the maxim just quoted. "It is said *ignorantia juris haud excusat*, but in that maxim the word *jus* is used in the sense of denoting general law, the ordinary law of the country. But when the word *jus* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may also be the result of matter of law: but if parties contract under a mutual mistake and * misapprehension as to their relative and [*376] respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake. Now that was the case with these parties—the respondents believed themselves to be entitled to the property; the petitioner believed that he was a stranger to it: the mistake is discovered and the agreement cannot stand." The case was that of a party the real owner of a property,

¹ See *Burt v. Bowles*, 69 Ind. 1; *American Ins. Co. v. Capps*, 4 Mo. App. 571; *King v. Doolittle*, 1 Head (Tenn.) 77.

² *Bilbie v. Lumley*, 2 East, 471; *Stevens v. Lynch*, 12 East, 38; *East India Co. v. Tritton*, 3 B. & C. 280; *Milnes v. Duncan*, 6 B. & C. 671;

Stewart v. Stewart, 6 Cl. & F. 966; *Teed v. Johnson*, 11 Ex. 840; *Platt v. Bromage*, 24 L. J. Ex. 63; *Wake v. Harrop*, 6 H. & N. 768; 1 H. & C. 202; 30 L. J. Ex. 273; 31 L. J. Ex. 451.

³ L. R. 2 H. L. 148-170; and see *Jones v. Clifford*, 3 Ch. D. 779.

agreeing in ignorance of his right, to take a lease of it from the supposed owners, who were equally ignorant that they had no title to it.

§ 492. [And in *Earl Beauchamp v. Winn*,¹ Lord Chelmsford said: "With regard to the objection, that the mistake (if any) was one of law, and that the rule, *Ignorantia juris neminem excusat* applies, I would observe upon the peculiarity of this case, that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well-known rule of law. And there are many cases to be found in which Equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake."

In Equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn as by the Courts of Common Law, and there are cases in which Equity grants relief against mistakes of law, the ground for the relief being that, under the particular facts of the case, it is inequitable that the one party should profit by the mistake of the other.²

And now it would seem that under the Judicature Act, 1873, sect. 25, sub-s. 11, the rule adopted by Courts of Equity will prevail.]

§ 493. An innocent misrepresentation of fact or law may give rise to a contract, and thus involve the question, [*377] whether the * party deceived by such innocent misrepresentation is entitled on that ground to avoid the contract.

The law as to misrepresentation of fact was thus stated by Blackburn J. in delivering the judgment of the Court in *Kennedy v. The Panama Mail Company*.¹ "There is a very

¹ L. R. 6 H. L. at p. 234.

² *Per* Turner L. J. in *Stone v. Godfrey*, 5 D. M. & G. at p. 90; *per* James L. J. in *Ex parte James*, 9 Ch. at p. 614; *per* Mellish L. J. in *Rogers*

v. Ingham, 3 Ch. D. C. A. at p. 357; *per cur.* in *Daniell v. Sinclair*, 6 App. Cas. at p. 190.

¹ L. R. 2 Q. B. 580-587.

important difference between cases where a contract may be rescinded on account of fraud, and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained. It is enough to show that there was a fraudulent representation as to *any part* of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to show *that there is a complete difference in substance* between what was supposed to be and what was taken, *so as to constitute a failure of consideration*. For example, where a horse is bought under a belief that it is sound, if the purchaser was induced to buy by a fraudulent representation as to the horse's soundness, the contract may be rescinded. If it was induced by an *honest misrepresentation* as to its soundness, *though it may be clear that both vendor and purchaser thought that they were dealing about a sound horse and were in error*, yet the purchaser *must pay the whole price*, unless there was a warranty: and even if there was a warranty, he cannot return the horse and claim back the whole price unless there was a condition to that effect in the contract, *Street v. Blay*.² The learned judge then quotes the authorities from the Civil Law to the same effect, and concludes the passage by saying, "And as we apprehend, the principle of our law is the same as that of the Civil Law; and the difficulty in every case is, to determine whether the mistake or misapprehension is *as to the substance of the whole consideration*, going as it were, to the root of the matter, or only to some point, even though a mate-

² 2 B. & Ad. 456. *Franklin v. Long*, 7 Gill & J. (Md.) 417, 419; *Hyatt v. Boyle*, 5 Gill & J. (Md.) 110; s. c. 25 Am. Dec. 276; *Bartlett v. Drake*, 100 Mass. 176; s. c. 1 Am. Rep. 101; *Morse v. Brackett*, 98 Mass. 209; *Boardman v. Spooner*, 95 Mass. (13 Allen) 361; *Bryant v. Leburg*, 79 Mass. (13 Gray) 607; s. c. 74 Am. Dec. 655; *Borr v. Fisher*, 55 Mass. (1 Cush.) 271, 274; *Conner v.*

Henderson, 15 Mass. 319; s. c. 8 Am. Dec. 103; *Perley v. Balch*, 40 Mass. (23 Pick.) 283; s. c. 34 Am. Dec. 56; *Kimball v. Cunningham*, 4 Mass. 502; s. c. 3 Am. Dec. 230; *Carter v. Walker*, 2 Rich. (S. C.) 40; *Thornton v. Wynn*, 25 U. S. (12 Wheat.) 183; bk. 6, L. ed. 595; *Doggett v. Emerson*, 3 Story C. C. 700, 732; *Daniel v. Mitchell*, 1 Story C. C. 172, 188; *Small v. Atwood*, 1 Young, 407, 459.

[*378] rial point, an error as * to which does not affect the substance of the whole consideration.”³

§ 494. In *Torrance v. Bolton*,¹ it was held that where a bidder at an auction was misled by the particulars advertised, as to the property exposed for sale, and being deaf did not hear the conditions read out at the sale in which the property was stated to be subject to mortgages, he was not bound by the contract made by mistake under such misleading particulars, which had induced him to believe that he was buying the absolute reversion of the freehold and not an equity of redemption. No fraud was shown, but the Court said, that the description in the particulars was “improper, insufficient, and not very fair.” (*Per James L. J.*, 8 Ch. at p. 123.)

This subject is further treated in the Chapter on Warranty, Book IV. Part II. Ch. 1.

§ 495. As to mistake or failure of consideration in a contract which was induced by an innocent misrepresentation of law, it was carefully considered by the Common Pleas in the two cases of *Southall v. Rigg* and *Forman v. Wright*,¹ and held to form a valid ground for avoiding a contract.

³ *Innocent misrepresentations.* — A contract founded upon material misrepresentations of facts, innocently made by one party or inadvertently through a mutual mistake of both parties, affords no ground for refusal to execute the contract. See *Coe v. Turner*, 5 Conn. 86; *Sherwood v. Salmon*, 5 Day (Conn.) 439; s. c. 5 Am. Dec. 167; *Walker v. Denison*, 86 Ill. 142; *Bird v. Forceman*, 62 Ill. 212; *Kyle v. Kavanagh*, 103 Mass. 356; 4 Am. Rep. 560; *Spurr v. Benedict*, 99 Mass. 463; *Parnum v. Randolph*, 5 Miss. (4 How.) 435; s. c. 35 Am. Dec. 403; *Roosevelt v. Dale*, 2 Cow. (N. Y.) 581; *Dale v. Roosevelt*, 5 Johns. Ch. (N. Y.) 174; *Champlin v. Laytin*, 6 Paige Ch. (N. Y.) 189; *Lewis v. McLemore*, 10 Yerg. (Tenn.) 206; *Smith v. Richards*, 38 U. S. (13

Pet.) 26, bk. 10, L. ed. 00; *Brooks v. Stolley*, 3 McL. C. C. 523; *Doggett v. Emerson*, 3 Story C. C. 733; *Hough v. Richardson*, 3 Story C. C. 659; *Daniel v. Mitchell*, 1 Story C. C. 172; *Tuthill v. Babcock*, 2 Woodb. & M. C. C. 299; *Smith v. Babcock*, 2 Woodb. & M. C. C. 246; *Mason v. Crosby*, 1 Woodb. & M. C. C. 342; *Ferson v. Sanger*, 1 Woodb. & M. C. C. 138; *Warner v. Daniels*, 1 Woodb. & M. C. C. 90; *Clapham v. Shillito*, 7 Beav. 149; *Pearson v. Morgan*, 2 Bro. C. C. 388; *Jennings v. Broughton*, 5 DeG. M. & G. (Am. ed.) 126, note 2; *Bigelow on Torts*, 23, note 1.

¹ 14 Eq. 124; 8 Ch. 118.

¹ Both reported in 11 C. B. 481; 20 L. J. C. P. 145. See, also, *Rushdall v. Ford*, 2 Eq. 750.

It is to be observed, however, that in both those cases, the mistake went in the above-quoted language of Mr. Justice Blackburn, "to the substance of the whole consideration," and it is apprehended that the right of rescinding a contract, on the ground of mistake of law induced by innocent misrepresentations, is subject to the same qualification and limitation as where there is a mistake of fact induced by the same cause, as explained in *Kennedy v. The Panama Mail Co.*, *supra*.

§ 496. In *Stevens v. Lynch*,¹ the drawer of a bill of exchange, knowing that time had been given to the acceptor without his, the drawer's, assent, but ignorant that in law he was thereby discharged, promised to pay the bill, and he was held bound.² This case was cited in *Forman v. Wright*, but Williams J. simply said,³ "That is a very *different case;" the difference being apparently [*379] this, that in the case of *Forman v. Wright*, the defendant had never owed the money at all, so that his error went "to the substance of the *whole* consideration," whereas, in *Stevens v. Lynch*, the defendant had been indebted to the plaintiff for a good consideration, and although the law discharges a surety where time is given to the principal debtor without the surety's assent, yet this is done on the ground that the condition of the surety is generally thereby altered; and *non constat* that in *Stevens v. Lynch*, the defendant's condition was really altered. Certainly the *whole* consideration of his promise to pay was not the mistake of law, inasmuch as the promise was manifestly based in part on the original consideration received when the bill was drawn.

In the case of *Beattie v. Lord Ebury*,⁴ there is an elaborate discussion of the law on this subject in its application to the

¹ 12 East, 38.

² *Breed v. Millhouse*, 7 Conn. 523; *Bryam v. Hunter*, 36 Me. 217; *Andrews v. Boyd*, 44 Mass. (3 Metc.) 434; *Martin v. Ingersoll*, 25 Mass. (8 Pick.) 1; *Dorsey v. Watson*, 14 Mo. 59; *Harvey v. Troupe*, 23 Miss. 538; *Loose v. Loose*, 86 Pa. St. 538, 545; *Hall v. Freeman*, 2 Nott & McC.

(S. C.) 479; *Gibbon v. Coggon*, 2 Campb. 188; *Taylor v. Jones*, 2 Campb. 105; *Pickin v. Graham*, 1 C. & M. 725; *Lundie v. Robertson*, 7 East, 231; 3 Kent Com. 113.

³ 2 L. J. C. P. at 149.

⁴ 7 Ch. 777, at p. 800; s. c. L. R. 7 H. L. 102.

case of an agent honestly representing himself to have an authority which he does not possess, and Mellish L. J. in delivering the judgment of the Court, expressed a very strong opinion, that if in such a case the written power was shown by the agent, he would not be responsible for the innocent misrepresentation of its legal effect.

§ 497. As early as 1797, it was held by the King's Bench to be settled law that a man who had advanced money on a contract of sale had a right to put an end to his contract for failure of consideration, and recover in an action for money had and received, if the vendor failed to comply with his entire contract.¹ A buyer may recover, on the same ground, the price paid to the seller who has warranted title, when the goods for which the money was paid turn out to have been stolen goods, and the buyer has been compelled to deliver them up to the true owner.² And, even without such warranty, it has been said to be the undoubted right of a buyer to recover back his money paid on the ordinary purchase of a chattel, where he does not get that for [*380] * which he paid;³ but this subject of failure of title is more elaborately treated, *post*, Book IV. Part II. Ch. 1, Sec. 2, on Implied Warranty of Title. And the same right exists in favor of the buyer where he has paid money for forged scrip in a railway:⁴ or for forged bills or notes:⁵

¹ *Giles v. Edwards*, 7 T. R. 181.

² *Eichholtz v. Banister*, 17 C. B. N. S. 708; 34 L. J. C. P. 105.

³ *Per cur.* in *Chapman v. Speller*, 14 Q. B. 621, and 19 L. J. Q. B. 241. *Howe Machine Co. v. Willie*, 85 Ill. 333; *Burt v. Bowles*, 69 Ind. 1, 7; *Minneapolis Harvester Works v. Holley*, 27 Ind. 495; *Thomas v. Knowles*, 128 Mass. 22.

⁴ *Westropp v. Solomon*, 8 C. B. 345.

⁵ *Jones v. Ryder*, 5 Taunt. 488; *Gurney v. Womersley*, 4 E. & B. 133; 24 L. J. Q. B. 46; *Woodland v. Fear*, 7 E. & B. 519; 26 L. J. Q. B. 202. See, also, *Sims v. Klein*, 1 Ill. (1 Breese) 234; *Baxter v. Duren*, 29 Me. 434; s. c.

50 Am. Dec. 602; *Keene v. Thompson*, 4 Gill & J. (Md.) 463; *Mudd v. Reeves*, 2 Harr. & J. (Md.) 368; *Merriam v. Wolcott*, 85 Mass. (3 Allen) 258; s. c. 80 Am. Dec. 69; *Cabot Bank v. Morton*, 70 Mass. (4 Gray) 156, 158; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; s. c. 9 Am. Dec. 111; *Young v. Adams*, 6 Mass. 182; *Bank of Missouri v. Benoist*, 10 Mo. 519; *Markle v. Hatfield*, 2 Johns. (N. Y.) 455; s. c. 3 Am. Dec. 446; *Hargrave v. Dusenberry*, 2 Hawks. (N. C.) L. 326; *Raymond v. Baar*, 13 Serg. & R. (Pa.) 318; s. c. 45 Am. Dec. 603; *Pindall v. Northwestern Bank*, 7 Leigh (Va.)

or for an article different from that which was described in the sale, as is shown *post*, in Book IV. Part I. on Conditions.⁶

§ 498. Where money was paid for shares in a projected joint-stock company, and the undertaking was abandoned, and the projected company not formed, the buyer was held entitled to recover back his money as paid on a consideration which had failed.¹ So, also, where a buyer has paid for a bill of exchange which proves to be invalid, having been avoided by a material alteration;² or for an unstamped bill of exchange which purports to be a foreign bill, and turns out to be worthless because really a domestic bill, invalid without a stamp,³ he may rescind the contract for failure of consideration.⁴

617; *Woodland v. Fear*, 7 El. & Bl. 519; *Gurney v. Womersley*, 4 El. & Bl. 133; *Trimmins v. Gibbons*, 18 Q. B. 722; *Jones v. Ryde*, 5 Taunt. 488.

⁶ See notes to *Chandelor v. Lopus*, 1 Sim. L. C. (ed. 1879) 183.

¹ *Kempson v. Saunders*, 4 Bing. 5.

² *Burchfield v. Moore*, 3 E. & B. 683; 32 L. J. Q. B. 261.

Massachusetts doctrine. — It was held in the case of *Talbot v. National Bank of Commonwealth*, 129 Mass. 67; s. c. 37 Am. Rep. 302, that if an indorser of a promissory note, relying upon a notice received from a notary public that the note had been dishonored, and being called upon to pay the note by a subsequent indorser, pays it to him, when in fact a proper demand has not been made upon the maker, such payment is made under a mistake of fact, and an action for money had and received will lie for the amount so paid. *Garland v. Salem Bank*, 9 Mass. 408; s. c. 6 Am. Dec. 86; see, also, *Union Bank v. United States Bank*, 3 Mass. 74; *Cripps v. Reade*, 6 T. R. 607.

³ *Gompertz v. Bartlett*, 2 E. & D. 849; 23 L. J. Q. B. 65.

⁴ *A contract for the sale of choses in action*, which prove to be worthless

can be avoided by the party injured. See *Terry v. Bissell*, 26 Conn. 23; *Snyder v. Reno*, 38 Iowa, 329; *Merriam v. Wolcott*, 85 Mass. (3 Allen) 258; s. c. 80 Am. Dec. 69; *Lobdell v. Baker*, 42 Mass. (1 Metc.) 193; s. c. 35 Am. Dec. 358; *Young v. Adams*, 6 Mass. 182; *Wood v. Sheldon*, 42 N. J. L. (13 Vr.) 421; s. c. 36 Am. Rep. 523; *Littauer v. Goldman*, 72 N. Y. 506; s. c. 28 Am. Rep. 171; *Ross v. Terry*, 63 N. Y. 613; *Bell v. Dagg*, 60 N. Y. 530; *Webb v. Odell*, 49 N. Y. 583; *Whitney v. National Bank of Potsdam*, 45 N. Y. 305; *Delaware Bank v. Jarvis*, 20 N. Y. 226; *Markle v. Hatfield*, 2 Johns. (N. Y.) 455; s. c. 3 Am. Dec. 446; *Dumont v. Williamson*, 18 Ohio St. 515; *Aldrich v. Jackson*, 5 R. I. 218; *Orand v. Mason*, 1 Swan. (Tenn.) 196; *Thrall v. Newell*, 19 Vt. 202, 208; s. c. 47 Am. Dec. 682; *Giffert v. West*, 33 Wis. 617; *Paul v. City of Kenosha*, 22 Wis. 266; *Hurd v. Hall*, 12 Wis. 112, 135; *Bank of United States v. Bank of Georgia*, 23 U. S. (10 Wheat.) 333; bk. 6, L. ed. 335; *Young v. Cole*, 3 Bing. N. C. 724; *Gompertz v. Bartlett*, 2 El. & Bl. 849; s. c. 75 Eng. C. L. 849. Compare *Jones v. Ryder*, 5 Taunt. 488;

§ 499. But there is not a failure of consideration when the buyer has received that which he really intended to buy, although the thing bought should turn out worthless.¹

s. c. 1 Eng. C. L. 488; *Shove v. Webb*, 1 T. R. 732. In *Littauer v. Goldman*, 72 N. Y. 506; s. c. 28 Am. Rep. 171; rev'g 9 Hun (N. Y.) 23, it is said that where the holder of a promissory note, which is tainted with usury, transferred it for a valuable consideration, without indorsement and without representations as to legality, in the absence of knowledge on his part at the time of the transfer of the defect, that no warranty against it will be implied, and that an action cannot be sustained against him for loss sustained by the purchaser by reason of the defect, because a scienter is essential to establish an implied warranty as to the validity of the note, the general doctrine being that upon such a transfer there is only an implied warranty of the title, and that the instrument is genuine. This case distinguishes, *Ross v. Terry*, 63 N. Y. 613; *Stone v. Frost*, 61 N. Y. 614; *Bell v. Dagg*, 60 N. Y. 530; *Webb v. Odell*, 49 N. Y. 583; *Whitney v. National Bank*, 45 N. Y. 305; *Fake v. Smith*, 7 Abb. (N. Y.) Pr. N. S. 106; *Ross v. Mather*, 47 Barb. (N. Y.) 582; *Gompertz v. Bartlett*, 2 Bl. & El. 849; s. c. 75 Eng. C. L. 849; *Williamson v. Allison*, 2 East, 446.

¹ *Defective article*. — In the absence of fraud or latent defects the acceptance of an article upon an executory contract of sale, after an opportunity to examine, equity will not relieve against mistake, where the party complaining had within his reach the means of ascertaining the true state of facts, and without being induced thereto by the other party, neglected to avail himself of his opportunity of information; it is a well established rule that if a party gets all he knowingly contracts for he will not be allowed to plead that he got no

consideration. *Neidefer v. Chastain*, 71 Ind. 363, 368; s. c. 36 Am. Rep. 198; *Smock v. Pierson*, 68 Ind. 405; s. c. 34 Am. Rep. 269; *Hess v. Young*, 59 Ind. 379; *Hunter v. McLaughlin*, 43 Ind. 38; *Baker v. Roberts*, 14 Ind. 552; *Harvey v. Dakin*, 12 Ind. 481; *Taylor v. Huff*, 7 Ind. 680; *Louden v. Birt*, 4 Ind. 566; *Hardesty v. Smith*, 3 Ind. 39; *Wheat v. Cross*, 31 Md. 99, 104; *Brown v. Fagan*, 71 Mo. 563; *Gaylord Manuf. Co. v. Allen*, 53 N. Y. 515; *Sankey v. First Nat. Bank of Mifflinburg*, 78 Pa. St. 48; *McCrea v. Longstreth*, 17 Pa. St. 316; *Steinhauer v. Witman*, 1 Serg. & R. (Pa.) 438; *Bryant v. Pember*, 45 Vt. 487.

However it is held that where the consideration for a promissory note is an interest in or a right under a void patent, it will not be sufficient consideration to support the note. *Harlow v. Putnam*, 124 Mass. 553; *Lester v. Palmer*, 86 Mass. (4 Allen) 145; *Nash v. Lull*, 102 Mass. 60; s. c. 3 Am. Rep. 438; *Dickinson v. Hall*, 31 Mass. (14 Pick.) 217; *Bliss v. Negus*, 8 Mass. 46; *Shepherd v. Jenkins*, 73 Mo. 510; *Cowan v. Dodd & Mitchell*, 3 Coldw. (Tenn.) 278. See *Myers v. Turner*, 17 Ill. 179; *McClure v. Jeffrey*, 8 Ind. 79; *Lester v. Palmer*, 86 Mass. (4 Allen) 145; *Bierce v. Stocking*, 77 Mass. (11 Gray) 174; *Dickinson v. Hall*, 31 Mass. (14 Pick.) 217; *Bliss v. Negus*, 8 Mass. 46; *Jolliffe v. Collins*, 21 Mo. 343; *Dunbar v. Marden*, 13 N. H. 311; *Cross v. Huntly*, 13 Wend. (N. Y.) 385; *Geiger v. Cook*, 3 Watts & S. (Pa.) 266; *Gray v. Billington*, 21 Up. Can. C. P. 288. But where an invention can be applied to any beneficial purpose, it is to be regarded as useful and the patent will be valid. *Nash v. Lull*, 102 Mass. 60; s. c. 3 Am. Rep. 435; *Green v. Stuart*, 7 Baxt. (Tenn.) 418. See *McKee v. Eaton*, 26 Kans. 226;

Thus, where a buyer bought railway scrip, and the directors of the company subsequently repudiated it as issued without their authority; upon proof offered that the scrip was the only known scrip of the railway, and had been for several months the subject of sale and purchase in the market, held, that the buyer had got what he really intended to buy; and could not rescind the contract on the ground of a failure of consideration.²

[And so where a person bought the exclusive right of using a patent in a foreign country, being aware at the time of the *purchase that no exclusive right to [*381] use the process there could be obtained, but desiring an ostensible grant of the exclusive right, with the object of floating a company: it was held, that having obtained what he desired and intended to buy, he could not recover the purchase-money on the ground that the consideration had failed.³]

§ 500. Where the failure of consideration is only partial, the buyer's right to rescind will depend on the question whether the contract is entire or not. Where the contract is entire, as in *Giles v. Edwards*,¹ and the buyer is not

Harlow v. Putnam, 124 Mass. 553; *Lester v. Palmer*, 86 Mass. (4 Allen) 145; *Shepherd v. Jenkins*, 73 Mo. 510; *Cowan v. Dodd*, 3 Coldw. (Tenn.) 278. Compare *Gray v. Billington*, 21 Up. Can. C. P. 288. The degree of its utility or practical value does not affect the validity of the patent. *Bedford v. Hunt*, 1 Mason C. C. 304; *Lowell v. Lewis*, 1 Mason C. C. 185, 188; *Roberts v. Ward*, 4 McL. C. C. 565; *Langdon v. De Groot*, 1 Paine C. C. 203; *Kneass v. Schuylkill Bank*, 4 Wash. C. C. 12. However, it would seem that where there is no warranty as to the utility of the invention, the fact that it does not answer fully the contemplated use to be made of it by the assignee, does not constitute a defence to an action on a note for the purchase price, for if there is a failure of an article by reason of a defect as to which the buyer takes the risk,

there is no want or failure of the consideration in the legal sense of the rule, even if thereby the article is rendered worthless; as the buyer in such case gets and retains what he bought, that is the property, at his own risk as to such defect. *Bryant v. Pember*, 45 Vt. 487, 491. See *Palmer's Appeal*, 96 Pa. St. 106; *Green v. Stuart*, 7 Baxt. (Tenn.) 418; *Clarke v. White*, 3 Duv. (Can.) 309.

² *Lamert v. Heath*, 15 M. & W. 487. See, also, *Lawes v. Purser*, 6 E. & B. 930; 26 L. J. Q. B. 25.

³ *Begbie v. Phosphate Sewage Co.*, L. R. 10 Q. B. 491; affirmed, 1 Q. B. D. 674, C. A.

¹ 7 T. R. 181, *ante*, p. 379. See *Whincup v. Hughes*, L. R. 6 C. P. 78; see, also, *Smith v. Lewis*, 49 Ind. 98; *Davis v. Maxwell*, 53 Mass. (12 Metc.) 286; *Hill v. Rewee*, 52 Mass. (11 Metc.) 268; *Clark v. Baker*, 46 Mass. (5

willing to accept a partial performance, he may reject the contract *in toto*, and recover back the price. But if he has accepted a partial performance, he cannot afterwards rescind the contract, but must seek his remedy in some other form of action. Thus, in *Harnor v. Groves*,² a purchaser of fifteen sacks of flour having, after its delivery to him, used half a sack, and then two sacks more, was held not entitled to rescind the contract, on the ground of a failure of consideration, and to return the remainder, although he had made complaint of the quality as not equal to that bargained for, as soon as he had tried the first half sack.³ So if the buyer has paid for a certain quantity of goods, and the vendor has delivered only part, and makes default in delivering the remainder, the buyer may rescind the contract for the deficiency, and recover the price paid for the quantity deficient; for the parties in this case have, by their conduct, given an implied assent to a severance of the contract by the delivery on the one part, and the acceptance on the other, of a portion only of the goods sold. This is in its nature a *total* failure of consideration for part of the price paid;⁴ not, as in the case of the flour, a *partial* failure of the whole. This was held, in *Devaux v. Connolly*,⁵ where the plaintiff had paid for two parcels of *terra japonica*, one of 25 tons, and the other of 150 tons, and the parcels turned out to be only 24 tons and 132½ tons respectively.

Metc.) 452; *Parish v. Stone*, 31 Mass. (14 Pick.) 198; s. c. 25 Am. Dec. 378; *Miner v. Bradley*, 39 Mass. (22 Pick.) 457; *Jenness v. Wendell*, 51 N. H. 63, 67, 70; s. c. 12 Am. Rep. 48; *Gault v. Brown*, 48 N. H. 183; *Paige v. Ott*, 5 Den. (N. Y.) 406; *Bruce v. Pearson*, 3 Johns. (N. Y.) 526; *Mills v. Hunt*, 17 Wend. (N. Y.) 333; *Shinn v. Bodine*, 60 Pa. St. 182; *Johnson v. Johnson*, 3 Bos. & Pul. 162; *Bigg v. Whisking*, 14 C. B. 195; *Story on Sales*, §§ 204, 240.

² 15 C. B. 669; 24 L. J. C. P. 53.

³ *Rescission of contract*.—The rescission of contract must be *in toto* and not in part. See *ante*, "Rescis-

sion and restoration." See, also, *Norris v. Harris*, 15 Cal. 226; *Young v. Conant Manuf. Co. of Wakefield*, 121 Mass. 91; *Mansfield v. Trigg*, 113 Mass. 350; *Morse v. Brackett*, 98 Mass. 205; s. c. 104 Mass. 494; *Clark v. Baker*, 46 Mass. (5 Metc.) 452; *Miner v. Bradley*, 39 Mass. (22 Pick.) 457; *Carpentier v. Minturn*, 65 Barb. (N. Y.) 293; *Morgan v. McKee*, 77 Pa. St. 228; *Johnson v. Johnson*, 3 Bos. & Pul. 162; *Mingaye v. White*, 34 Up. Can. Q. B. 82.

⁴ *Devine v. Edwards*, 101 Ill. 138; *Wright v. Cook*, 9 Up. Can. Q. B. 605.

⁵ 8 C. B. 640.

§ 501. * On the other hand, if the thing sold is [*382] such in its nature as not to be severable, and the buyer has enjoyed any part of the consideration for which the price was paid, he is no longer at liberty to rescind the contract.¹ Thus in *Taylor v. Hare*,² where the plaintiff purchased from the defendant the use of a patent right, and had made use of it for some years, and then discovered the defendant not to be the inventor, it was held that he could not maintain an action for rescission of the contract and return of the price, on the ground of failure of consideration; and this case was followed by the King's Bench half a century later in *Lawes v. Purser*,³ where the facts as pleaded were almost identical with those in *Taylor v. Hare*.

In *Chanter v. Leese*,⁴ the Exchequer Chamber, in the case of a sale of six patents for one consideration, five of which were valid, and one void, held, that there had been an entire failure of consideration, on the ground that the money payable had not been apportioned by the contract to the different parts of the consideration, and the patents had not been enjoyed in part by the buyer. "We see, therefore, that the consideration is entire, and the payment agreed to be made by the defendants is entire, and we see also a failure of the consideration, which being entire, *by failing partially, fails entirely*; and it follows that no action can be maintained for the money." The Court further stated that even if the five patents had been enjoyed, they were of opinion that no action could be maintained *on the agreement*, though possibly a remedy might exist in some other form of action.

¹ *Articles sold not severable*.—Where articles sold are not severable, the contract of sale is entire and cannot be rescinded in part, on discovering that a portion of the articles are different from the others. *Morse v. Brackett*, 98 Mass. 205. See *Clark v. Baker*, 46 Mass. (5 Metc.) 452, 461; *Bowker v. Hoyt*, 35 Mass. (18 Pick.) 555; *Conner v. Henderson*, 15 Mass. 319; s. c. 8 Am. Dec. 103. The right of rescission is limited to cases

where the vendor can be put in *statu quo* as before the contract. *Morse v. Brackett*, 98 Mass. 205, 209; *Perley v. Balch*, 40 Mass. (23 Pick.) 283; s. c. 34 Am. Dec. 56; *Conner v. Henderson*, 15 Mass. 319; s. c. 8 Am. Dec. 103; *Kimball v. Cunningham*, 4 Mass. 502; s. c. 3 Am. Dec. 230; *Hunt v. Silk*, 5 East, 449.

² 1 B. & P. N. R. 260.

³ 6 E. & B. 930; 26 L. J. Q. B. 25.

⁴ 5 M. & W. 698.

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*CHAPTER II.

FRAUD.

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Section I.—IN GENERAL.

§ 502. FRAUD renders all contracts *voidable ab initio* both at law and in equity.¹ No man is bound by a bargain into which he has been deceived by a fraud, because assent is necessary to a valid contract, and there is no real assent

¹ *McCulloch v. Scott*, 13 B. Mon. (Ky.) 172; s. c. 56 Am. Dec. 561; *Adams v. Nelson*, 22 Up. Can. Q. B. 199.

Election to rescind must be exercised promptly on learning of the fraud (*Southern Life Ins. Co. v. Lanier*, 5 Fla. 110; s. c. 58 Am. Dec. 448; *Masson v. Bovet*, 1 Den. (N. Y.) 69; s. c. 43 Am. Dec. 651); and the property returned *McCulloch v. Scott*, 13 B. Mon. (Ky.) 172; s. c. 56 Am. Dec. 561; *Masson v. Bovet*, 1 Den. (N. Y.) 69; s. c. 43 Am. Dec. 651. The vendor of personal property cannot treat his sale as void on account of the vendor's fraud, and still retain the consideration. *Duncan v. Jeter*, 5 Ala. 604; s. c. 39 Am. Dec. 342; *Hynson v. Dunn*, 5 Ark. 395; s. c. 41 Am. Dec. 100; *Gatling v. Newell*, 9 Ind. 578; *Johnson v. McLane*, 7 Blackf. (Ind.) 501; s. c. 43 Am. Dec. 102; *Chance v. Commissioners of Clay Co.*, 5 Blackf. (Ind.) 441; s. c. 35 Am. Dec. 131; *Carneal v. May*, 2 A. K. Marsh. (Ky.) 587; s. c. 12 Am. Dec. 458; *Durrett v. Simpson*, 3 T. B. Mon. (Ky.) 517; s. c. 16 Am. Dec. 116; *Bassett v. Brown*, 105 Mass. 558; *Bartlett v. Drake*, 100 Mass.

176; s. c. 1 Am. Rep. 101; *Morse v. Brackett*, 98 Mass. 205; s. c. 104 Mass. 494; *Perley v. Balch*, 40 Mass. (23 Pick.) 283; s. c. 34 Am. Dec. 56; *Thurston v. Blanchard*, 39 Mass. (22 Pick.) 18; s. c. 33 Am. Dec. 700; *Conner v. Henderson*, 15 Mass. 319; s. c. 8 Am. Dec. 103; *Kimball v. Cunningham*, 4 Mass. 502; s. c. 3 Am. Dec. 230; *Luey v. Bundy*, 9 N. H. 298; s. c. 32 Am. Dec. 359; *Buckenhimer v. Angevine*, 81 N. Y. 394; *Cobb v. Hatfield*, 46 N. Y. 533; *Curtiss v. Howell*, 39 N. Y. 215; *Tallman v. Turck*, 26 Barb. (N. Y.) 170; *Stevens v. Hyde*, 32 Barb. (N. Y.) 182; *Bartholomew v. Finnemore*, 17 Barb. (N. Y.) 429; *Wheaton v. Baker*, 14 Barb. (N. Y.) 597; *Voorhees v. Earl*, 2 Hill (N. Y.) 288; s. c. 38 Am. Dec. 588; *Kinney v. Kiernan*, 2 Lans. (N. Y.) 495; *Smith v. Brittain*, 3 Ired. (N. C.) Eq. 347; s. c. 42 Am. Dec. 175; *Poor v. Woodburn*, 25 Vt. 234. If the vendor has taken the vendee's note in payment, it is not necessary that he offer to return the note before rescission, it will be sufficient if he surrender it at the trial. *Ryan v. Brant*, 42 Ill. 86; *Thurston v. Blanchard*, 39 Mass. (22 Pick.) 18;

where fraud and deception have been used as instruments to control the will and influence the assent.²

Although fraud has been said to be "every kind of artifice employed by one person for the purpose of deceiving another," courts and lawgivers have alike wisely refrained from any attempt to define with exactness what constitutes a fraud, it being so subtle in its nature, and so Protean in its disguises, as to render it almost impossible to give a definition which fraud would not find means to evade.³

s. c. 33 Am. Dec. 700; *Nichols v. Michael*, 23 N. Y. 264; s. c. 80 Am. Dec. 259. However this is true only where the note given is the note of the purchaser only. *Bassett v. Brown*, 105 Mass. 558; where the note is that of the vendee and a third person, and the vendor wishes to rescind because of false and fraudulent representation as to the surety's solvency, he must first offer to return the note. *Moriarty v. Stofferan*, 89 Ill. 528. Where the vendor has received other property in payment, which property he has disposed of, he must account for the price at which it was estimated at the time of the sale. *Durrett v. Simpson*, 3 T. B. Mon. (Ky.) 517; s. c. 16 Am. Dec. 517. In those cases where the vendor has received part payment it is not necessary that it be first refunded where the vendee has proceeds sufficient to reimburse himself derived from sale of the goods. *Peters v. Hilles*, 48 Md. 506.

Wilful misrepresentation of quality is not sufficient to avoid a sale of personal property unless the party was deceived by it, unless it formed an inducement to him to make the purchase. *President, &c., of Connersville v. Wadleigh*, 7 Blackf. (Ind.) 102; s. c. 41 Am. Dec. 214.

² *Where a contract is in itself fraudulent it is void and cannot be confirmed by any subsequent declarations or acts by which variance is acknowledged.* *Duncan v. McCullough*, 4 Serg. & R. (Pa.) 487; *Brooke v. Gally*, 2 Atk. 34; *Wiseman v. Beake*,

2 Vern. 121; *Ardglasse v. Muschamp*, 1 Vern. 237; *Chesterfield v. Janssen*, 2 Ves. Sr. 125; *Baugh v. Price*, 1 Wils. 320. See, also, *Bank of Georgia v. Higginbottom*, 34 U. S. (9 Pet.) 48; bk. 9, L. ed. 46.

³ See *Sledge v. Scott*, 56 Ala. 202, 206; *Todd v. Fambro*, 62 Ga. 664; *Smith v. Newton*, 59 Ga. 113; *Hanna v. Rayburn*, 84 Ill. 533; *Merwin v. Arbuckle*, 81 Ill. 501; *Gregory v. Schœnell*, 55 Ind. 101, 106; *Bowman v. Carithers*, 40 Ind. 90; *Frenzel v. Miller*, 37 Ind. 117; *McDonald v. Trafton*, 15 Me. 225; *Gunby v. Sluter*, 44 Md. 237, 247; *Cochrane v. Halsey*, 25 Minn. 52, 63; *Parker v. Marquis*, 64 Mo. 38, 42; *Stewart v. Emerson*, 52 N. H. 301, 313; *Dambmann v. Schulting*, 75 N. Y. 55, 61; *Paul v. Hadley*, 23 Barb. (N. Y.) 521; *Bench v. Sheldon*, 14 Barb. (N. Y.) 66; *Hadley v. Clinton Co. Importing Co.*, 13 Ohio St. 502; *Rodman v. Thalheimer*, 75 Pa. St. 232; *Weist v. Grant*, 71 Pa. St. 95; *Clark v. Everhart*, 63 Pa. St. 347; *Phipps v. Buckman*, 30 Pa. St. 401; *Smith v. Smith*, 21 Pa. St. 367, 378; s. c. 54 Am. Dec. 578. But the fraud need not be the sole inducement. *Winter v. Bandel*, 30 Ark. 363, 373; *Ruff v. Jarrett*, 94 Ill. 475, 480; *McAleer v. Horsey*, 35 Md. 439, 452; *Safford v. Grout*, 120 Mass. 20, 25; *Matthews v. Bliss*, 39 Mass. (22 Pick.) 48; *Morgan v. Skiddy*, 62 N. Y. 319; *Shaw v. Stine*, 8 Bosw. (N. Y.) 157; *Hersey v. Benedict*, 15 Hun (N. Y.) 282, 287; *People v. Haynes*, 11 Wend. (N. Y.)

The Roman juriconsults attempted definitions, two of which are here given: "Dolum malum SERVIVS quidem ita definit, machinationem quandam alterius decipiendi causa, cum aliud simulatur, et aliud agitur. LABEO autem, posse et sine simulatione id agi ut quis circumveniat: posse et sine dolo malo aliud agi, aliud simulari; sicuti faciunt qui per ejus modi dissimulationem deserviant, et tuentur vel sua vel aliena: Itaque, ipse sic definit, dolum malum esse omnem calliditatem, fallaciam, machinationem ad circumvenendum, * fallendum, decipiendum alterum adhibitam. Labeonis definitio vera est." Dig. l. iv., t. 3, l. 1, § 2.

§ 503. The Civil Code of France, without giving a definition, provides, in Art. 1116: "Fraud is a ground for avoiding a contract when the devices (les manœuvres) practised by one of the parties are such as to make it evident that without these devices the other party would not have contracted."

§ 504. However difficult it may be to define what fraud is in all cases, it is easy to point out some of the elements which must necessarily exist before a party can be said at common law to have been defrauded. In the first place it is essential that the means should be successful in *deceiving*.¹ However

557; *Clarke v. Dickson*, 6 C. B. N. S. 453; *Rawlins v. Wickham*, 3 De G. & J. 304; *Reynell v. Sprye*, 1 De G. M. & G. 660; *Smith v. Kay*, 7 H. L. Cas. 750, 775; *Traill v. Baring*, 33 L. J. Ch. 521, 527; *Kerr on F. & M.* (1st Am. ed.) 74, 75.

¹ See *Smith v. Newton*, 59 Ga. 113; *Bowman v. Carithers*, 40 Ind. 80; *Hagee v. Grossman*, 31 Ind. 223; *Gunby v. Sluter*, 44 Md. 237; *Bruce v. Burr*, 67 N. Y. 237; *Vandewalker v. Osmer*, 65 Barb. (N. Y.) 556; *Taylor v. Fleet*, 1 Barb. (N. Y.) 471; *Morris Canal Co. v. Emmett*, 9 Paige, Ch. (N. Y.) 168; s. c. 37 Am. Dec. 388; *Foy v. Haughton*, 83 N. C. 467; *Clark v. Everhart*, 63 Pa. St. 347; *Phipps v. Buckman*, 30 Pa. St. 402; *Stebbins v. Eddy*, 4 Mason C. C. 414; *Doggett v. Emerson*, 3 Story C. C.

732; *Mason v. Crosby*, 1 Woodb. & M. C. C. 342; *Vigers v. Pike*, 8 Cl. & Fin. (Am. ed.) 562, 650; *Attwood v. Small*, 6 Cl. & F. (Am. ed.) 233, and note (2); 2 Chit. Contr. (11th Am. ed.) 1036, and note (z). The presumption is that fraudulent representations made by one party were relied upon by the other. *Holbrook v. Burt*, 39 Mass. (22 Pick.) 546, 552; *Fishback v. Miller*, 15 Nev. 428, 443; *Redgrave v. Hurd*, 20 Ch. D. 1. But see *Jackson v. Collins*, 39 Mich. 557; *Merriam v. Pine City Lumber Co.*, 23 Minn. 314; *Sims v. Eiland*, 57 Miss. 607; *Taylor v. Guest*, 58 N. Y. 262.

Mere misrepresentation of the law will not be sufficient to avoid the sale. *Fish v. Cleland*, 33 Ill. 243; *Clodfelter v. Hulett*, 72 Ind. 137, 143;

false and dishonest the artifices or contrivances may be by which one man may attempt to induce another to contract, they do not constitute a fraud if that other knows the truth, and sees through the artifices and devices.² *Haud enim decipitur qui scit se decipi.* If a contract is made under such circumstances, the inducement or motive for making it is *ex concessis*, not the false and fraudulent representations, which are not believed, but some other independent motive.³ [And

Burt v. Bowles, 69 Ind. 1; Rose v. Hurley, 39 Ind. 77, 82; Clem v. Newcastle & D. R. R. Co., 9 Ind. 488; s. c. 68 Am. Dec. 653; Rawson v. Harger, 48 Iowa, 269; Dailey v. Jessup, 72 Mo. 144; Aetna Ins. Co. v. Reed, 33 Ohio St. 283, 293; Upton v. Tribilcock, 91 U. S. (1 Otto) 45, 50; bk. 23, L. ed. 203.

² See sec. 502, note 1, and, also, Younge v. Harris, 2 Ala. 108; Thorne v. Prentiss, 83 Ill. 99; Strong v. Livingston, 8 Ill. App. 436; Rose v. Hurley, 39 Ind. 82, 83; Bean v. Herrick, 12 Me. 262; s. c. 28 Am. Dec. 176; Clopton v. Cozart, 21 Miss. (13 Smed. & M.) 363; Merchants' Bank v. Sells, 3 Mo. App. 85; Mead v. Bunn, 32 N. Y. 275; Vandewalker v. Osmer, 65 Barb. (N. Y.) 556; Boyce v. Grundy, 28 U. S. (3 Pet.) 210; bk. 7, L. ed. 655; Dominion Bank v. Blair, 30 Up. Can. C. B. 591; Smith's Case, L. R. 2 Ch. App. 614; Redgrave v. Hurd, 20 Ch. D. 1; Vigers v. Pike, 8 Cl. & Fin. 562, 650; Perfect v. Lane, 3 De G. F. & J. 369; Conybeare v. The New Brunswick & C. Ry. Co., 1 De G. F. & J. 578, and notes; s. c. 9 H. L. Cas. 711; Kisch v. Central Venezuela R. Co., 3 De G. J. & S. 122; s. c. L. R. 2 H. L. Cas. 99, 120, 121; Wilson v. Short, 6 Hare, 366, 375; Deveber v. Roop, 3 Pugs. (N. B.) 295; Kerr on F. & M. (1st Am. ed.) 79, 255; Kerr Inj. 39.

³ The misrepresentation must be material to relieve from the contract or furnish a foundation for suit in damages. Wilcox v. Henderson, 64 Ala. 535; Cooper v. Merritt, 30 Ark. 686;

Winter v. Bandel, 30 Ark. 362; Bradley v. Luce, 99 Ill. 234; Schwabacker v. Riddle, 99 Ill. 343; Smith v. Brittenham, 98 Ill. 188; Melendy v. Keen, 89 Ill. 395; Bond v. Ramsey, 89 Ill. 29; Race v. Weston, 86 Ill. 91; Hanna v. Rayburn, 84 Ill. 533; Higgins v. Bicknell, 82 Ill. 502; Miller v. Young, 33 Ill. 355; Jones v. Hathaway, 77 Ind. 14; Elsass v. Moore's Hill Institute, 77 Ind. 72; Welshbillig v. Dienhart, 65 Ind. 94; Meyers v. Funk, 56 Iowa, 52; Noel v. Morton, 50 Iowa, 687; Dawson v. Graham, 48 Iowa, 378; Rawson v. Harger, 48 Iowa, 269; Mather v. Robinson, 47 Iowa, 403; Commonwealth v. Jackson, 132 Mass. 16; Blair v. Laffin, 127 Mass. 518; Teague v. Irwin, 127 Mass. 217; Nowlan v. Cain, 85 Mass. (3 Allen) 263; Stevens v. Rainwater, 4 Mo. App. 292; Miller v. Barber, 66 N. Y. 558; Duffany v. Ferguson, 66 N. Y. 482; Rice v. Manley, 66 N. Y. 82; s. c. 23 Am. Rep. 300; Smith v. Countryman, 30 N. Y. 655; Swikehard v. Russell, 66 Barb. (N. Y.) 560; Mason v. Raplee, 66 Barb. (N. Y.) 180; Brown v. Tuttle, 66 Barb. (N. Y.) 169; Bower v. Fenn, 90 Pa. St. 359; Gordon v. Butler, 105 U. S. 553; bk. 26, L. ed. 1166; Smith v. Richards, 33 U. S. (13 Pet.) 26; bk. 10, L. ed. 42; Sanders v. Lyon, 2 McArthur (D. C.) 452; Lapp v. Firstbrook, 24 Up. Can. C. P. 239; Jennings v. Broughton, 5 De G. M. & G. 126; Kerr on F. & M. (1st Am. ed.) 73, 74.

even if the one party is unaware of the truth, yet if the artifice adopted by the other has not induced him to enter into the contract, that is to say, if the fraud is not *fraus dans locum contractui*, he will not be entitled to relief.]

§ 505. Next, it is now well settled that there can be no fraud without dishonest intention, no such fraud as was formerly termed a *legal fraud*. Therefore, however false may be the representation of one party to another to induce him to make a contract, there is no ground for avoiding it *as obtained by fraud*, if the party making the representation *honestly and on reasonable grounds* believed it to be true;¹ although other remedies are sometimes available to the deceived party, *ante*, p. 376 *et seq.*, *post*, Warranty.

§ 506. Lastly, there must be damage to the party deceived, even when there is a knowingly false representation, before a right of action can arise. "Fraud without damage, or damage without fraud, gives no cause of action," was the maxim laid down by Croke J. in 3 Bulst. 95, and quoted with approval by Buller J. in the great leading case of *Pasley v. Freeman*,¹ to which more particular [*387] attention will presently be drawn.

¹ See *Righter v. Roller*, 31 Ark. 170; *Sellar v. Clelland*, 2 Colo. 532; *Kimbell v. Moreland*, 55 Ga. 164; *Wharf v. Roberts*, 88 Ill. 426; *St. Louis & S. E. R. R. Co. v. Rice*, 85 Ill. 406; *Tone v. Wilson*, 81 Ill. 529; *Merwin v. Arbuckle*, 81 Ill. 501; *Mitchell v. McDougall*, 62 Ill. 498; *Josselyn v. Edwards*, 57 Ind. 212; *McDonald v. Trafton*, 15 Me. 225; *Beach v. Bemis*, 107 Mass. 498; *Cooper v. Lovering*, 106 Mass. 78, 79; *Fisher v. Mellen*, 103 Mass. 503, 506; *French v. Vining*, 102 Mass. 132; *King v. Eagle Mills*, 92 Mass. (10 Allen) 548; *Brown v. Castles*, 65 Mass. (11 Cush.) 348, 351; *Stone v. Denny*, 45 Mass. (4 Metc.) 151, 155; *Page v. Bent*, 43 Mass. (2 Metc.) 371; *Tyron v. Whitmarsh*, 42 Mass. (1 Metc.) 1; s. c. 35 Am. Dec. 339; *Salem India Rubber Co. v. Adams*, 40 Mass. (23 Pick.) 256; *Pettigrew*

v. Chellis, 4 N. H. 95; *Page v. Parker*, 40 N. H. 47, 69; *Hanson v. Edgerly*, 29 N. H. 343; *Stitt v. Little*, 63 N. Y. 427; *Morehouse v. Yeager*, 41 N. Y. Super. Ct. (9 J. & S.) 135; *Barrett v. Western*, 66 Barb. (N. Y.) 205; *Babcock v. Libbey*, 53 How. (N. Y.) Pr. 255; *Young v. Covell*, 8 Johns. (N. Y.) 25; s. c. 5 Am. Dec. 316; *Westcott v. Ainsworth*, 9 Hun (N. Y.) 53; *Marshall v. Fowler*, 7 Hun (N. Y.) 237; *Frisbee v. Fitzsimons*, 3 Hun (N. Y.) 674; *Duff v. Williams*, 85 Pa. St. 490; *Dilworth v. Bradner*, 85 Pa. St. 238; *Boyd v. Browne*, 6 Pa. St. 310; *Weeks v. Burton*, 7 Vt. 67; *Lord v. Goddard*, 54 U. S. (13 How.) 198; bk. 14, L. ed. 111; *Russell v. Clark*, 11 U. S. (7 Cr.) 69; bk. 3, L. ed. 271; *French v. Skead*, 24 Grant (Ont.) 179; 2 Chit. Contra. (11th Am. ed.) 1044, 1045.

¹ 3 T. R. 51; 2 Am. L. C. (8th ed.) 66.

The whole doctrine on the subject was very much discussed in the House of Lords, in the celebrated case of *Atwood v. Small*;² and in Lord Brougham's opinion, the principles unanimously conceded to be true by their lordships are carefully laid down.³

§ 507. The mistaken belief as to facts may be created by active means, as by fraudulent concealment or knowingly false representation; or passively, by mere silence when it is a duty to speak. But it is only where a party is under some pledge or obligation to reveal facts to another that mere silence will be considered as a means of deception.¹

American authorities.—*Hughes v. Sloan*, 8 Ark. (3 Eng.) 146; *Hart v. Tallmadge*, 2 Day (Conn.) 382; s. c. 2 Am. Dec. 105; *Young v. Hall*, 4 Ga. 95; *Bartlett v. Blain*, 83 Ill. 25; s. c. 25 Am. Rep. 346; *Weatherford v. Fishback*, 4 Ill. (3 Scam.) 170; *Hagee v. Grossman*, 31 Ind. 223; *Fisher v. Mellen*, 103 Mass. 505; *Milliken v. Thorndike*, 103 Mass. 385; *Randall v. Hazelton*, 94 Mass. (12 Allen) 414; *Stiles v. White*, 52 Mass. (11 Metc.) 356; s. c. 45 Am. Dec. 214; *Medbury v. Watson*, 47 Mass. (6 Metc.) 246; s. c. 39 Am. Dec. 726; *Page v. Bent*, 43 Mass. (2 Metc.) 371, 374; *Adams v. Paige*, 24 Mass. (7 Pick.) 542; *Newell v. Horn*, 45 N. H. 422; *Hanson v. Edgerly*, 29 N. H. 357; *White v. Merritt*, 7 N. Y. 352; s. c. 57 Am. Dec. 527; *Phipps v. Buckman*, 30 Pa. St. 402; *Castleman v. Griffin*, 13 Wis. 535; see *McMaster v. Geddes*, 19 Up. Can. Q. B. 216.

² 6 Cl. & Fin. 232. The opinions delivered by some of the law lords in this case are considered and explained by Jessel M. R. in *Redgrave v. Hurd*, 20 Ch. D. 1, C. A. pp. 14-17.

³ 6 Cl. & Fin. pp. 443-7. See, also, *per* Lord Wensleydale, in *Smith v. Kay*, 7 H. L. C. at p. 774.

¹ *Smith v. Hughes*, L. R. 6 Q. B. 597; and see an interesting case be-

fore the Supreme Court of the United States, *Laidlaw v. Organ*, 15 U. S. (2 Wheat.) 178; bk. 4, L. ed. 214.

Concealment of a material fact.—*Van Arsdale v. Howard*, 5 Ala. 596; *Roseman v. Canovan*, 43 Cal. 110; *Otis v. Raymond*, 3 Conn. 418; *Roper v. The Trustees of Sangamon Lodge*, 91 Ill. 518; s. c. 33 Am. Rep. 60; *Emmons v. Moore*, 85 Ill. 304; *Atwood v. Chapman*, 68 Me. 38; s. c. 28 Am. Rep. 5; *Prentiss v. Russ*, 16 Me. 30; *Sides v. Hilleary*, 6 Har. & J. (Md.) 86; *French v. Vining*, 102 Mass. 135; *Coddington v. Goddard*, 82 Mass. (16 Gray) 436; *Matthews v. Bliss*, 39 Mass. (22 Pick.) 48; *Hanson v. Edgerly*, 29 N. H. 343; *Stevens v. Fuller*, 8 N. H. 463; *Brown v. Montgomery*, 20 N. Y. 287; s. c. 75 Am. Dec. 404; *Howell v. Biddlecom*, 62 Barb. (N. Y.) 131; *Nickle v. Thomas*, 22 Barb. (N. Y.) 652; *March v. First Nat. Bank of Mobile*, 4 Hun (N. Y.) 466; *Croyle v. Moses*, 90 Pa. St. 250; s. c. 35 Am. Rep. 654; *Maynard v. Maynard*, 49 Vt. 297; *Paddock v. Strobbridge*, 29 Vt. 470; *Baker v. Humphrey*, 101 U. S. 494; bk. 25, L. ed. 1065; *Smith v. Richards*, 38 U. S. (13 Pet.) 26; bk. 10, L. ed. 42; *Cassel v. Herron*, 5 Clark (Pa.) 250; *Lovelace v. Harrington*, 27 Grant (Ont.) 178; *Machar v. Vandewater*, 26 Grant (Ont.) 83; *Green v. Gosden*, 3 M. & G. 446, 450;

There are, however, cases in which a non-disclosure of a material fact may be equivalent to active misrepresentation, for the withholding of that which is not stated may make that which is stated absolutely false.² Or, again, it may be that from the nature of the transaction, the fact not disclosed is such that it is impliedly represented not to exist.³

§ 508. In general, where an article is offered for sale, and is open to the inspection of the purchaser, the common law does not permit the latter to complain that the defects, if any, of the article are not pointed out to him.¹ The rules are *Caveat emptor* and *Simplex commendatio non obligat*. The buyer is always anxious to buy as cheaply as he can, and is suffi-

Irvine v. Kirkpatrick, 7 Bell's Sc. App. 186; 2 Chit. Contr. (11th Am. ed.) 1042, 1043.

² *Per* Lord Cairns in *Peek v. Gurney*, L. R. 6 H. L. at p. 403. And this statement of the law has been approved and explained by James L. J. in *Arkwright v. Newbold*, 17 Ch. D. C. A. at p. 317, and by Jessel M. R. in *Smith v. Chadwick*, 20 Ch. D. C. A. at p. 58.

³ *Per* Blackburn J. in *Lee v. Jones*, 17 C. B. N. S. at p. 506, and *per eundem* in *Phillips v. Foxall*, L. R. 7 Q. B. at p. 679.

See *Armstrong v. Huffstutler*, 19 Ala. 51; *Turner v. Huggins*, 14 Ark. 21; *Stephens v. Orman*, 10 Fla. 9; *Marsh v. Webber*, 13 Minn. 109; *Hanson v. Edgerly*, 29 N. H. 343; *Devoe v. Brandt*, 53 N. Y. 462; *Brown v. Montgomery*, 20 N. Y. 287; s. c. 75 Am. Dec. 404; *Pease v. McClelland*, 2 Bond C. C. 42.

¹ *Stephens v. Orman*, 10 Fla. 9; *Port v. Williams*, 6 Ind. 219; *Dickinson v. Lee*, 106 Mass. 557, 558, 559; *Mooney v. Miller*, 102 Mass. 220; *Veasey v. Doton*, 85 Mass. (3 Allen) 380; *Brown v. Castles*, 65 Mass. (11 Cush.) 350; *Hoitt v. Holcomb*, 32 N. H. 185, 202-205; *Lytle v. Bird*, 3 Jones (N. C.) 222; *Hough v. Richardson*, 3 Story C. C. 659; *Smith v. Babcock*, 2 Woodb. & M. C. C. 246;

Tuthill v. Babcock, 2 Woodb. & M. C. C. 298; *Warner v. Daniels*, 1 Woodb. & M. C. C. 90, 101, 102; *Vigers v. Pike*, 8 Cl. & Fin. 650; *Attwood v. Small*, 6 Cl. & Fin. (Am. ed.) 233 and note (2); *Aberaman Iron Works v. Wickens*, L. R. 4 Ch. App. 101; s. c. L. R. 5 Eq. 485.

Reasonable diligence must be used by the party to whom the representation is made to ascertain its truth or falsity. *Crown v. Carriger*, 66 Ala. 590; *Bank of Woodland v. Hiatt*, 58 Cal. 234; *Huston v. McCloskey*, 76 Ind. 38; *Hess v. Young*, 59 Ind. 379; *Poland v. Brownell*, 131 Mass. 138; s. c. 41 Am. Rep. 215; *Dickinson v. Lee*, 106 Mass. 557; *Cooper v. Lovering*, 106 Mass. 77, 79; *Prescott v. Wright*, 70 Mass. (4 Gray) 461; *Brown v. Castles*, 65 Mass. (11 Cush.) 348; *Newell v. Horn*, 45 N. H. 422; *Long v. Warren*, 68 N. Y. 426; *Sparmann v. Keim*, 44 N. Y. Super. Ct. (12 J. & S.) 163; *Furman v. Titus*, 40 N. Y. Super. Ct. (8 J. & S.) 284; *Randall v. Farnum*, 52 Vt. 539; *Chamberlain v. Rankin*, 49 Vt. 133; *Coates v. Bacon*, 21 Grant (Ont.) 21; *McRae v. Froom*, 17 Grant (Ont.) 337; *Crooks v. Davis*, 6 Grant (Ont.) 317; *Attwood v. Small*, 6 Cl. & Fin. 233; *James v. Litchfield*, L. R. 9 Eq. 51; 1 Sugden V. & P. (8th Am. ed.) 331.

ciently prone to find imaginary fault in order to get a good bargain, and the vendor is equally at liberty to praise [*388] his merchandize in * order to enhance its value if he abstain from a fraudulent representation of facts, provided the buyer have a full and fair opportunity of inspection, and no means are used for hiding the defects.² If the buyer is unwilling to bargain on these terms, he can protect himself against his own want of care or skill by requiring from the vendor a warranty of any matters, the risk of which he is unwilling to take on himself. But the use of any device by the vendor to induce the buyer to omit inquiry or examination into the defects of the thing sold is as much of a fraud as an active concealment by the vendor himself.³

§ 509. [In America, the doctrine that mere "dealer's talk" will not give rise to an action of deceit has been carried very far. Thus, in *Ellis v. Andrews*,¹ a false statement by the vendor as to the value of stock was held to be a mere expression of opinion as to the value of the thing sold, and as such giving no right of action to the purchaser who bought on the faith of it.]

² *Mere statement not in the form of a warranty will not be binding.* *Righter v. Roller*, 31 Ark. 170; *Merwin v. Arbuckle*, 81 Ill. 501; *Homer v. Perkins*, 124 Mass. 431; s. c. 26 Am. Rep. 677; *Brown v. Leach*, 107 Mass. 364; *Cooper v. Lovering*, 106 Mass. 79; *Mooney v. Miller*, 102 Mass. 217; *Hemmer v. Cooper*, 90 Mass. (8 Allen) 334; *Veasey v. Doton*, 85 Mass. (3 Allen) 381; *Gordon v. Parmelee*, 84 Mass. (2 Allen) 212; *Brown v. Castles*, 65 Mass. (11 Cush.) 350; *Medbury v. Watson*, 47 Mass. (6 Metc.) 259, 260; s. c. 39 Am. Dec. 726; *Willard v. Randall*, 65 Me. 81, 86; *Bishop v. Small*, 63 Me. 12; *Holbrook v. Connor*, 60 Me. 578, 582; s. c. 11 Am. Rep. 212; *Chrysler v. Canaday*, 90 N. Y. 272; s. c. 43 Am. Rep. 166; *Wolcott v. Mount*, 38 N. J. L. (9 Vr.) 496, 499; s. c. 13 Am. Rep. 438.

³ *Caveat emptor* applies to sale of chattels and the purchaser has no

right to rely upon the representation of value as of fact, nor to place any confidence in it; he must use his own judgment regarding such matters. *Dillard v. Moore*, 7 Ark. 166; *Protection, &c. Co. v. Osgood*, 93 Ill. 69, 76; *Cogel v. Kniseley*, 89 Ill. 589; *Morris v. Thompson*, 85 Ill. 16; *McClanahan v. McKinley*, 52 Iowa, 222; *Graffenstein v. Epstein*, 23 Kans. 443; s. c. 33 Am. Rep. 171; *Teague v. Irwin*, 127 Mass. 217; *Beninger v. Corwin*, 24 N. J. L. (4 Zab.) 257; *Morrison v. Koch*, 32 Wis. 254; *Peek v. Gurney*, L. R. 6 H. L. 403; *Arkwright v. Newbold*, 17 Ch. Div. 317; *Smith v. Chadwick*, 20 Ch. Div. 58.

Studied efforts to conceal the facts may amount to false representations. *Roseman v. Canovan*, 43 Cal. 110, 118; *Smith v. Countryman*, 30 N. Y. 655, 681.

¹ 56 N. Y. 83; and see *Bishop v. Small*, 63 Me. 12.

§ 510. The authorities on which the foregoing preliminary remarks are based will be referred to in the detailed investigation which it is proposed to make of the subject, divided, for convenience, into three parts; 1st, fraud on the vendor; 2d, on the purchaser; 3d, on creditors, including the law on Bills of Sale. But it will be useful first to point out that a man may make himself liable in an *action, founded on tort* for fraud or deceit or [perhaps] negligence¹ in respect of a contract, brought by parties with whom he has not contracted, by a stranger, by any one of the public at large who may be injured by such deceit or negligence.

[But the liability is limited in this way, that to enable a third person, a stranger to the contract, to maintain an action of deceit, it must appear that he has been injured by acting upon the defendant's false representation, made with the *direct* intent that he should act upon it in the manner which has occasioned the injury or loss.²

§ 511. *The principles by which the limits of [*389] responsibility for a false representation are to be ascertained, were laid down by Lord Hatherley (then Wood V.-C.) in *Barry v. Crosskey*,¹ as follows:—

“First. Every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and so acting, is injured or damaged.

“Secondly. Every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting, is injured or damaged, *provided it appear that such false representation was made with the intent that it should be acted upon*

¹ *George v. Skivington*, L. R. 5 Ex. 1; but see *Heaven v. Pender*, 9 Q. B. D. 102, where *George v. Skivington* is disapproved, and the earlier case of *Winterbottom v. Wright*, 10 M. & W. 109, followed in preference.

² *Langridge v. Levy*, 2 M. & W. 159; in error, 4 M. & W. 337, as ex-

plained and commented upon by Wood V.-C. in *Barry v. Crosskey*, 2 J. & H. 117, 118, 123; and by Lord Cairns in *Peek v. Gurney*, L. R. 6 H. L. 377, 412; see, also, *Hosegood v. Bull*, 36 L. T. N. S. 617.

¹ 2 J. & H. at p. 122, adopted by Lord Cairns in *Peek v. Gurney*, L. R. 6 H. L. pp. 412, 413.

by such third person in the manner that occasions the injury or loss.

“Thirdly. The injury must be the *immediate* and not the remote consequence of the representation thus made. To render a man responsible for the consequence of a false representation made by him to another, upon which a third person acts, and so acts, is injured and damnified, it must appear that such false representation was made with the *direct* intent that it should be acted upon by such third person in the manner that occasions the injury or loss.”²]

§ 512. The case usually cited as the leading one on this point is *Langridge v. Levy*,¹ where the defendant offered for sale a gun, on which he put a ticket in these terms: “Warranted, this elegant twist gun, by Nock, with case complete, made for his late Majesty, George IV.: cost 60 guineas; only 25 guineas.” The gun was sold to the plaintiff’s father, who told the defendant that it was wanted “for the use of himself and his sons. It was warranted to be a good, safe, and secure gun, and to have been made by Nock.” The gun burst in the hands of the plaintiff, injuring him severely, and it was proven not to be of Nock’s make. Parke B. delivered the judgment of the Court, after time taken for consideration. He said: “If the instrument in question . . .

[*390] had been delivered *by the defendant *to the plaintiff* for the purpose of being used *by him*, with an accompanying representation to him that he might *safely so use it*, and that representation had been *false to the defendant’s knowledge*, and the plaintiff had acted upon the faith of its

² *False representations must have been addressed directly to the party who seeks a remedy for having been deceived and defrauded by means thereof.* *Commonwealth v. Harley*, 48 Mass. (7 Metc.) 462; *Commonwealth v. Call*, 38 Mass. (21 Pick.) 509, 515; s. c. 32 Am. Dec. 284; *Eaton v. Avery*, 83 N. Y. 31, 33; *Morgan v. Skiddy*, 62 N. Y. 319; *Bruff v. Mali*, 36 N. Y. 200; *Newberry v. Garland*, 31 Barb. (N. Y.) 121; *Cazeaux v. Mali*, 25 Barb. (N. Y.) 578. However, it

would seem that if the statement is made for the purpose of being communicated to the purchaser with the purpose of influencing his act by such statement, he may have his remedy. *Commonwealth v. Harley*, 48 Mass. (7 Metc.) 462; *Commonwealth v. Call*, 38 Mass. (21 Pick.) 515; s. c. 32 Am. Dec. 284; *Naugatuck Cutlery Co. v. Babcock*, 22 Hun (N. Y.) 481, 485.

¹ 2 M. & W. 519; in error, 4 M. & W. 337.

being true, and had received damage thereby, then there is no question but that an action would have lain upon the principle of a numerous class of cases, of which the leading one is that of *Pasley v. Freeman*;² which principle is that *a mere naked falsehood is not enough to give a right of action: but if it be a falsehood told with the intention that it should be acted upon by the party injured, and that act must produce damage to him; if instead of being delivered to the plaintiff immediately, the instrument had been placed in the hands of a third person, for the purpose of being delivered to and then used by the plaintiff, the like false representation being knowingly made to the intermediate person to be communicated to the plaintiff, and the plaintiff had acted upon it, there can be no doubt but that the principle would equally apply, and the plaintiff would have his remedy for the deceit.*"

In the Exchequer Chamber the judgment was affirmed on the ground "that as there is fraud; and damage the result of that fraud; not from an act remote and consequential, but one contemplated by the defendant at the time, as one of its results, the party guilty of the fraud is responsible to the party injured."

§ 513. In *George v. Skivington*,¹ the plaintiffs, Joseph George and Emma, his wife, claimed damages of the defendant, a chemist, for selling to the husband a bottle of a chemical compound to be used by the wife, as the defendant then knew, for washing her hair. The declaration charged negligence and unskilfulness of the defendant in making the said compound, and alleged personal injury to the wife resulting from the use of it. Demurrer and joinder. Held, a good cause of action on the authority of *Langridge v. Levy*. [This case, however, has met with disapproval, and is very doubtful law.²]

² 3 T. R. 51, and 2 Sm. L. C. (ed. 1879) 66, where all the authorities are collected. See, also, *Randall v. Hazelton*, 94 Mass. (12 Allen) 414, 415; *Medbury v. Watson*, 43 Mass. (6 Metc.) 246, 259; s. c. 39 Am. Dec.

726; *Lobdell v. Baker*, 42 Mass. (1 Metc.) 201; s. c. 35 Am. Dec. 358; *Pasley v. Freeman*, 3 T. R. 51.

¹ L. R. 5 Ex. 1; 39 L. J. Ex. 8.

² See *Heaven v. Pender*, 9 Q. B. D. 102.

[*391] § 514. * But no action growing *out of the contract* can be maintained in such cases, except by parties or proxies.¹

The distinction was clearly illustrated in a case in the Queen's Bench, where there were two counts in the declaration; the first, on contract, which was held bad, the second, in *tort*, which was sustained. The fraud charged was issuing to the public a false and fraudulent prospectus for a company, whereby the plaintiff was deceived into taking shares.²

This principle, that the liability in an action of *tort* may be enforced against a party guilty of fraudulent representations publicly given out and intended to deceive the public at large, by any person who has suffered damages in consequence of them, has since been frequently enforced by the Courts.³

§ 515. [But it is now conclusively settled, overruling some of the earlier decisions, that this liability can only be enforced in cases where the person, who complains that he has been injured by acting in reliance upon the false representations, can establish in the communication of the false representations some direct connection between himself and the person publishing them.

This was decided by the House of Lords in *Peek v. Gurney*,¹ where it was held that the responsibility of directors who issue a prospectus for an intended company misrepresenting actual and material facts, and concealing facts material to be known, does not, *as of course*, follow the shares on their transfer from an allottee to one who afterwards purchases them from him upon the market, the ground

¹ *Winterbottom v. Wright*, 10 M. & W. 109; *Longmeid v. Holiday*, 6 Ex. 761; *Howard v. Shepherd*, 9 C. B. 297; 19 L. J. C. P. 249; *Playford v. United Kingdom Telegraph Co.*, L. R. 4 Q. B. 706.

² *Gerhard v. Bates*, 2 E. & B. 476; 22 L. J. Q. B. 364.

³ *Scott v. Dixon*, reported in note, 29 L. J. Ex. 62; decided by the Q. B. in 1859; *Bagshaw v. Seymour*, in

note, 29 L. J. Ex. 62, and 18 C. B. 903; *Bedford v. Bagshaw*, 4 H. & N. 538; 29 L. J. Ex. 59. But these two last cases are overruled by *Peek v. Gurney*, *infra*. See, also, *North Brunswick Railway Co. v. Conybeare*, 9 H. L. C. 712; *Western Bank of Scotland v. Addie*, L. R. 1 Sc. Ap. 145; *Henderson v. Lacon*, 5 Eq. 249 (V. C. W.).

¹ L. R. 6 H. L. 377.

of the decision being, that as the object of the prospectus was * to induce persons to become original [*392] shareholders in the company, its office was fulfilled when the shares were once allotted.^{2]}

§ 516. The following action was held to be maintainable in the State of New York. A. had agreed to bring certain animals for sale and delivery to B., at a specified place. A third person, desirous of making a sale to B., falsely represented to him that A. had abandoned all intention of fulfilling his contract thereby inducing B. to supply himself by buying from that third person. A. was put to expense and loss of time in bringing the animals to the appointed place and otherwise disposing of them. In an action for damages for the deceit against the third person by A., it was not only held that he was entitled to recover, but that it was no defence to the action that the contract between A. and B. was one that could not have been enforced.¹

We will now revert to the subject of fraud as specially applied in cases of sale.

² In this case, *Seymour v. Bagshaw*, and *Bedford v. Bagshaw* (*ubi supra*), were expressly overruled; and *Scott v. Dixon* (*ubi supra*), *Gerhard v. Bates* (*ante*, p. 391), *Langridge v. Levy*, and *Barry v. Crosskey* (*ante*, p. 389), were explained and adopted by Lord Chelmsford, at p. 396, and by Lord Cairns, at p. 412.

American cases. — *Commonwealth Harley*, 48 Mass. (7 Metc.) 462; *Dayton v. Monroe*, 47 Mich. 193; *Powers v. Benedict*, 88 N. Y. 605; *The Eaton, &c. Co. v. Avery*, 83 N. Y. 31; *Barnes v. Brown*, 80 N. Y. 527; *Morgan v. Skiddy*, 62 N. Y. 319; *Arthur v. Griswold*, 55 N. Y. 400; *McGoldrick v. Willits*, 52 N. Y. 612, 620; *Wakeman v. Dalley*, 51 N. Y. 27; s. c. 10 Am. Rep. 557; *Kinney v. Kiernan*, 49 N. Y. 164; *Bruff v. Mali*, 86 N. Y. 200;

Thomas v. Winchester, 6 N. Y. 397; s. c. 57 Am. Dec. 457; *Roth v. Palmer*, 27 Barb. (N. Y.) 652; *Cazeaux v. Mali*, 25 Barb. (N. Y.) 578; *Fenn v. Curtis*, 25 Hun (N. Y.) 384; *Wigand v. Sichel*, 3 Keyes (N. Y.) 120; *Bartholomew v. Bentley*, 15 Ohio, 659; s. c. 45 Am. Dec. 596; *Downer v. Smith*, 32 Vt. 1; s. c. 3 Am. Dec. 482; *Grant v. Law*, 29 Wis. 99; *Bank of Montreal v. Thayer*, 2 McC. C. C. 1; s. c. 7 Fed. Rep. 622, 628.

¹ *Benton v. Pratt*, 2 Wend. 385. See notice of this case by Colt J. in *Randall v. Hazleton*, 94 Mass. 412, at p. 417. See *Rice v. Manley*, 66 N. Y. 82; s. c. 23 Am. Rep. 300; *White v. Merritt*, 7 N. Y. 352; *Snow v. Judson*, 38 Barb. (N. Y.) 210.

Section II.—FRAUD ON THE VENDOR.

§ 517. It is not until quite recently that it was finally settled whether the property in goods passes by a sale which the vendor has been fraudulently induced to make. The recent cases of *Stevenson v. Newnham*,¹ in the Exchequer Chamber, and of *Pease v. Gloahec*,² in the Privy Council, confirming the principles asserted by the Exchequer in *Kingsford v. Merry*,³ taken in connection with the decision of the House of Lords in *Oakes v. Turquand*,⁴ leave no room for further question. By the rules established in [*393] these cases, whenever goods are *obtained from their owner by fraud, we must distinguish whether the facts show a *sale* to the party guilty of the fraud, or a mere delivery of the goods into his *possession*, induced by fraudulent devices on his part.⁵ In other words, we must ask whether the owner intended to transfer both the property in, and the possession of, the goods to the person guilty of the fraud, or to deliver nothing more than the bare possession. In the former case, there is a contract of sale, however fraudulent the device, and the property passes: but not in the latter case.⁶

¹ 13 C. B. 285, and 22 L. J. C. P. 10.

² L. R. 1 P. C. 220; 3 Moo. P. C. N. S. 556.

³ 11 Ex. 577, and 25 L. J. Ex. 166.

⁴ L. R. 2 H. L. 325. See, also, *Reese River Mining Co. v. Smith*, 2 Ch. 604, and L. R. 4 H. L. 64; and *Clough v. London & North Western Railway Co.*, L. R. 7 Ex. 26, *post*, page 400.

⁵ A *fraudulent purchase* acquires no title to the goods as against the party defrauded. *Butler v. Collins*, 12 Cal. 462; *Stevens v. Hyde*, 32 Barb. (N. Y.) 175; *Tallman v. Turck*, 26 Barb. (N. Y.) 170; *Buckley v. Archer*, 21 Barb. (N. Y.) 585; *Van Neste v. Conover*, 20 Barb. (N. Y.) 547; *Hunter v. Hudson River, &c. Co.*, 20 Barb. (N. Y.) 501; *Wheaton v. Baker*, 14 Barb. (N. Y.) 597; *Roth v. Palmer*,

27 Barb. (N. Y.) 654; *King v. Phillips*, 8 Bosw. (N. Y.) 607; *Cary v. Hotailing*, 1 Hill (N. Y.) 313; s. c. 37 Am. Dec. 323; *Ash v. Putnam*, 1 Hill (N. Y.) 305; *Durell v. Haley*, 1 Paige Ch. (N. Y.) 492; s. c. 19 Am. Dec. 444; *Crary v. Sprague*, 12 Wend. (N. Y.) 41; s. c. 27 Am. Dec. 110; *Root v. French*, 13 Wend. (N. Y.) 570; s. c. 28 Am. Dec. 482; *Barker v. Dinsmore*, 72 Pa. St. 427; s. c. 13 Am. Rep. 697; *Gilbert v. Hoffman*, 2 Watts (Pa.) 66; s. c. 26 Am. Dec. 103; *Knowles v. Lord*, 4 Whart. (Pa.) 500; s. c. 34 Am. Dec. 525; *Farr v. Sims, Rich.* (S. C.) Eq. Cas. 122; s. c. 24 Am. Dec. 396; *Stockwell v. United States*, 80 U. S. (13 Wall.) 566; bk. 20, L. ed. 491.

⁶ A *fraudulent purchase of goods* accompanied with delivery is not void but voidable only, at the elec-

§ 518. In the former case the contract is *voidable* at the election of the vendor, not void *ab initio*.¹ It follows, therefore, that the vendor may affirm and enforce it, or may rescind it. He may sue in assumpsit for the price, and this affirms the contract, or he may sue in trover for the goods or their value, and this disaffirms it.² But in the meantime, and

tion of the vendor, and until a sale is avoided the vendee has power to make a transfer to a *bonâ fide* purchaser having no notice of the fraud. *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 307; *Somes v. Brewer*, 19 Mass. (2 Pick.) 184; s. c. 13 Am. Dec. 406; *Parker v. Patrick*, 5 T. R. 175.

¹ *Hewitt v. Clark*, 91 Ill. 605; *Titcomb v. Wood*, 38 Me. 561, 563; *Ditson v. Randall*, 33 Me. 202; *Oriental Bank v. Haskins*, 44 Mass. (3 Metc.) 332; s. c. 37 Am. Dec. 140; *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 307, 312; s. c. 23 Am. Dec. 607; *Mowrey v. Walsh*, 8 Cow. (N. Y.) 238.

² *Purchase of property by means of false representation as to solvency vests no title in the vendee, and the vendor may recapture the property if it can be done without necessary violence to the persons and without breach of peace.* *Poor v. Woodburn*, 25 Vt. 238; *Dustin v. Cowdry*, 23 Vt. 646; *Hodgeden v. Hubbard*, 18 Vt. 504; s. c. 46 Am. Dec. 167. See *McBean v. Fox*, 1 Ill. App. 177; *Butler v. Hildreth*, 46 Mass. (5 Metc.) 49; *Stewart v. Emerson*, 52 N. H. 301.

Who may avoid fraudulent sale.—A fraudulent sale can only be avoided by the party defrauded. Thus where the fraud is on the part of the vendee he will be bound by the purchase unless the defrauded vendor chooses to avoid it. *Brown v. Pierce*, 97 Mass. 46; *Thayer v. Turner*, 49 Mass. (8 Metc.) 552; *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 307, 312; s. c. 22 Am. Dec. 607; *Henry v. Daley*, 17 Hun (N. Y.) 210; *White v. Garden*,

10 C. B. 919. And where a party purchases from such *bonâ fide* purchaser without notice of the fraud on a new consideration before the vendor has exercised his election to disaffirm the sale he will get a good title. *Paige v. O'Neal*, 12 Cal. 498; *Williamson v. Russell*, 39 Conn. 406; *Thompson v. Rose*, 16 Conn. 71; s. c. 41 Am. Dec. 121; *Mears v. Waples*, 3 Houst. (Del.) 581; *Kern v. Thurber*, 57 Ga. 172; *Ohio & M. R. R. Co. v. Kerr*, 49 Ill. 458; *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Fawcett v. Osborn*, 32 Ill. 411; *Brundage v. Camp*, 21 Ill. 330; *Jennings v. Gage*, 13 Ill. 614; s. c. 56 Am. Dec. 476; *Bell v. Cafferty*, 21 Ind. 411; *Wood v. Yeatman*, 15 B. Mon. (Ky.) 270; *Gibson v. Moore*, 7 B. Mon. (Ky.) 92; *Miles v. Oden*, 8 Mart. (La.) N. S. 214; s. c. 19 Am. Dec. 177; *Titcomb v. Wood*, 38 Me. 561; *Ditson v. Randall*, 33 Me. 202; *Hall v. Hinks*, 21 Md. 406; *Powell v. Bradlee*, 9 Gill & J. (Md.) 220; *Hoffman v. Noble*, 47 Mass. (6 Metc.) 68; s. c. 39 Am. Dec. 711; *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 307, 312; s. c. 23 Am. Dec. 607; *Cochran v. Stewart*, 21 Minn. 435; *Barnard v. Campbell*, 58 N. Y. 73, 799; s. c. 17 Am. Rep. 208; *Devoe v. Brandt*, 53 N. Y. 462; *Winne v. McDonald*, 39 N. Y. 240; *Western Trans. Co. v. Marshall*, 4 Abb. App. Dec. (N. Y.) 575; s. c. 6 Abb. (N. Y.) Pr. N. S. 283; *Penfield v. Dunbar*, 64 Barb. (N. Y.) 250; *Dows v. Greene*, 32 Barb. (N. Y.) 490; *Dows v. Rush*, 28 Barb. (N. Y.) 157; *Malcom v. Loveridge*, 13 Barb. (N. Y.) 372; *Hoyt v. Sheldon*, 3 Bosw. (N. Y.) 267; *Mowrey v. Walsh*, 8 Cow.

until he elects, *if his vendee transfer the goods in whole or in part, whether the transfer be of the general or of a special property in them, to an innocent third person for a valuable consideration, the rights of the original vendor will be subordinate to those of such innocent third person.*⁸ If, on the contrary, the

(N. Y.) 238; *Craig v. Marsh*, 2 Daly (N. Y.) 61; *Beavers v. Lane*, 6 Duer (N. Y.) 232; *Danforth v. Dart*, 4 Duer (N. Y.) 101; *Lewis v. Palmer*, Hill & Den. (N. Y.) 68; *Moore v. Miller*, 6 Lans. (N. Y.) 402; *Durell v. Haley*, 1 Paige Ch. (N. Y.) 492; *Manufacturers' &c. Bank v. Farmers' &c. Bank*, 2 T. & C. (N. Y.) 402; *Saltus v. Everett*, 20 Wend. (N. Y.) 267; s. c. 32 Am. Dec. 541; *Andrew v. Dieterich*, 14 Wend. (N. Y.) 34; *Root v. French*, 13 Wend. (N. Y.) 570; s. c. 28 Am. Dec. 402 and note; *Williams v. Merle*, 11 Wend. (N. Y.) 80; s. c. 25 Am. Dec. 613; *Harris v. Horner*, 1 Dev. & B. (N. C.) Eq. 455; s. c. 30 Am. Dec. 182; *Sinclair v. Healy*, 40 Pa. St. 417; s. c. 80 Am. Dec. 589; *Thompson v. Lee*, 3 Watts & S. (Pa.) 479; *Hawkins v. Davis*, 5 Baxt. (Tenn.) 698; *Arendale v. Morgan*, 5 Sneed (Tenn.) 703; *Old Dominion St. Co. v. Burckhardt*, 31 Gratt. (Va.) 664; *Williams v. Givens*, 6 Gratt. (Va.) 268; *Shufeldt v. Pease*, 16 Wis. 659; *Rateau v. Bernard*, 3 Blatchf. C. C. 248; *Johnson v. Peck*, 1 Woodb. & M. C. C. 334; *In re Sime*, 12 Nat. Bank. Reg. 318; *Babcock v. Lawson*, L. R. 4 Q. B. Div. 394; *Moyce v. Newington*, L. R. 4 Q. B. Div. 32; *White v. Garden*, 10 C. B. 919; s. c. 20 L. J. C. P. 167; *Kingsford v. Merry*, 11 Ex. 577; *Pease v. Gloahec*, 3 Moo. P. C. (N. S.) 556; *Parker v. Patrick*, 5 T. R. 175.

⁸ *Attenborough v. London and St. Katherine's Dock Co.*, 3 C. P. D. 450, C. A.; *Babcock v. Lawson*, 4 Q. B. D. 394; 5 Q. B. D. 284, C. A.

American authorities. — *Williamson v. Russell*, 39 Conn. 406; *Mears v. Waples*, 3 Houst. (Del.) 581; *Kern v. Thurber*, 57 Ga. 172; *Nicol v. Crit-*

tenden, 55 Ga. 497; *Dickerson v. Evans*, 84 Ill. 451; *Henson v. Westcott*, 82 Ill. 224; *McNab v. Young*, 81 Ill. 11; *Ohio & M. R. R. v. Kerr*, 49 Ill. 458; *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Jennings v. Gage*, 13 Ill. 610; s. c. 56 Am. Dec. 476; *Gregory v. Schoenell*, 55 Ind. 101; *Hutchinson v. Watkins*, 17 Iowa, 475; *Wilson v. Fuller*, 9 Kans. 176; *Tourtellott v. Pollard*, 74 Me. 418; *Titcomb v. Wood*, 38 Me. 561; *Ditson v. Randall*, 33 Me. 202; *Neal v. Williams*, 18 Me. 391; *Hall v. Hinks*, 21 Md. 406; *Moody v. Blake*, 117 Mass. 23, 26; s. c. 19 Am. Rep. 394; *Hoffman v. Noble*, 47 Mass. (6 Metc.) 73; s. c. 39 Am. Dec. 711; *George v. Kimball*, 41 Mass. (24 Pick.) 241; *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 307, 312; s. c. 23 Am. Dec. 607; *Somes v. Brewer*, 19 Mass. (2 Pick.) 184; s. c. 13 Am. Dec. 406; *Cochran v. Stewart*, 21 Minn. 435; *Bradley v. Obear*, 10 N. H. 477; *Devoe v. Brandt*, 53 N. Y. 462; *Paddon v. Taylor*, 44 N. Y. 371; *Crocker v. Crocker*, 31 N. Y. 507; *Smith v. Lynes*, 5 N. Y. 46; *Western Trans. Co. v. Marshall*, 4 Abb. App. Dec. (N. Y.) 575; *Barnard v. Campbell*, 65 Barb. (N. Y.) 286, 292; *Dows v. Greene*, 32 Barb. (N. Y.) 490; *Hunter v. Hudson River Iron Co.*, 20 Barb. (N. Y.) 493; *Malcom v. Loveridge*, 13 Barb. (N. Y.) 373; *Williams v. Birch*, 6 Bosw. (N. Y.) 299; *Holbrook v. Vose*, 6 Bosw. (N. Y.) 104, 111; *Mowrey v. Walsh*, 8 Cow. (N. Y.) 238; *Meacham v. Collignon*, 7 Daly (N. Y.) 402; *Craig v. Marsh*, 2 Daly (N. Y.) 61; *Beavers v. Lane*, 6 Duer (N. Y.) 232; *Keyser v. Harbeck*, 3 Duer (N. Y.) 373; *Caldwell v. Bartlett*, 3 Duer (N. Y.) 341; *Ash*

intention of the vendor was not to pass the property, but merely to part with the *possession* of the goods, there is

v. Putnam, 1 Hill (N. Y.) 302, 306, 307; *Williamson v. Mason*, 12 Hun (N. Y.) 97; *Anderson v. Roberts*, 18 Johns. (N. Y.) 515; s. c. 9 Am. Dec. 235; *Hoffman v. Carow*, 22 Wend. (N. Y.) 318; *Root v. French*, 13 Wend. (N. Y.) 570; s. c. 28 Am. Dec. 428; *Dean v. Yates*, 22 Ohio St. 388; *Sinclair v. Healy*, 40 Pa. St. 417; s. c. 80 Am. Dec. 589; *Hawkins v. Davis*, 5 Baxt. (Tenn.) 698; *Shufeldt v. Pease*, 16 Wis. 659; *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. (Va.) 664; *Williams v. Given*, 6 Gratt. (Va.) 268.

A *bonâ fide* purchaser from a fraudulent purchaser without notice of the fraud gets a good title as against the defrauded vendor who cannot recover the property from him. *Paige v. O'Neal*, 12 Cal. 483, 497; *Sargent v. Sturm*, 23 Cal. 359; *Williamson v. Russell*, 39 Conn. 406, 412; *Lynch v. Beecher*, 38 Conn. 490; *Mears v. Waples*, 3 Houst. (Del.) 581, 620; *aff'd* 4 Houst. (Del.) 62; *Kern v. Thurber*, 57 Ga. 172; *Nicol v. Crittenden*, 55 Ga. 497; *Holland v. Swain*, 94 Ill. 154; *Van Duzor v. Allen*, 90 Ill. 499; *Ohio & M. R. R. Co. v. Kerr*, 49 Ill. 458; *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Brundage v. Camp*, 21 Ill. 330; *Bell v. Cafferty*, 21 Ind. 411; *Claffin v. Cottman*, 77 Ind. 58; *Sharp v. Jones*, 18 Ind. 314; *Wilson v. Fuller*, 9 Kans. 176; *Arnett v. Cloudas*, 4 Dana (Ky.) 299; *Wood v. Yeatman*, 15 B. Mon. (Ky.) 270; *Lee v. Kimball*, 45 Me. 172; *Titcomb v. Wood*, 38 Me. 561; *Ditson v. Randall*, 33 Me. 202; *Hall v. Hinks*, 21 Md. 406, 418; *Powell v. Bradlee*, 9 Gill & J. (Md.) 220, 278; *Sleeper v. Chapman*, 121 Mass. 408; *Moody v. Blake*, 117 Mass. 26; s. c. 19 Am. Rep. 394; *Easter v. Allen*, 90 Mass. (8 Allen) 7; *Coggill v. Hartford & N. H. R. R.*, 69 Mass. (3 Gray) 545; *Hoffman v. Noble*, 47 Mass. (6 Metc.)

68; s. c. 39 Am. Dec. 711; *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 307; s. c. 23 Am. Dec. 607; *Cochran v. Stewart*, 21 Minn. 435; *Lee v. Portwood*, 41 Miss. 109; *Wineland v. Coonce*, 5 Mo. 296; s. c. 32 Am. Dec. 320; *Kingsbury v. Smith*, 13 N. H. 109; *Stevens v. Brennan*, 79 N. Y. 254; *Paddon v. Taylor*, 44 N. Y. 371; *Fassett v. Smith*, 23 N. Y. 252; *Saltus v. Everett*, 20 Wend. (N. Y.) 267; s. c. 32 Am. Dec. 541; *Combes v. Chandler*, 33 Ohio St. 178; *Dean v. Yates*, 22 Ohio St. 388, 395; *Swift v. Holdridge*, 10 Ohio, 230; s. c. 36 Am. Dec. 85; *Sinclair v. Healy*, 40 Pa. St. 417; s. c. 80 Am. Dec. 589; *Hood v. Fahnestock*, 8 Watts (Pa.) 489; s. c. 34 Am. Dec. 489; *Hawkins v. Davis*, 8 Baxt. (Tenn.) 506; s. c. 5 Baxt. (Tenn.) 698; *Gage v. Epperson*, 2 Head (Tenn.) 669; *Arendale v. Morgan*, 5 Sneed (Tenn.) 703; *Old Dominion Steamship Co. v. Burckhardt*, 31 Gratt. (Va.) 664, 678; *Wickham v. Martin*, 13 Gratt. (Va.) 427; *Williams v. Given*, 6 Gratt. (Va.) 268; *Singer Manuf. Co. v. Sammons*, 49 Wis. 316; *The Schooner Mary Ann Guest, Olcott (U. S. D. C.)* 501. But the purchaser in order to protect himself must show affirmatively that he paid value for the goods before notice of the fraud. *Easter v. Allen*, 90 Mass. (8 Allen) 10. No protection, under this rule, will be afforded to a *bonâ fide* purchaser where his vendor purchased on condition that he was not to remove or sell the goods, and that the title was not to be his until they were paid for, because such a conditional vendee, cannot in violation of the condition, vest a good title in a *bonâ fide* purchaser from him. *Carter v. Kingman*, 103 Mass. 517.

There are a class of cases, however, which hold that an honest pur-

no *sale*, and he who obtains such *possession* by fraud can convey no property in them to any third person, however

chaser, under a defective title, holds against the true owner. *Boyce v. Brockway*, 31 N. Y. 493; *Linnen v. Cruger*, 40 Barb. (N. Y.) 633; *Cobb v. Dows*, 9 Barb. (N. Y.) 243; s. c. 10 N. Y. 339; *Robinson v. Dauchy*, 3 Barb. (N. Y.) 30; *Caldwell v. Bartlett*, 3 Duer (N. Y.) 352; *Ash v. Putnam*, 1 Hill (N. Y.) 306; *Rawles v. Dishler*, 28 How. (N. Y.) Pr. 69; because an owner cannot be deprived of goods except by his own acts. *Brower v. Peabody*, 2 Abb. (N. Y.) Pr. 218; s. c. 11 How. (N. Y.) Pr. 492; *Spaulding v. Brewster*, 50 Barb. (N. Y.) 144; *Ballard v. Burgett*, 47 Barb. (N. Y.) 651; *Blossom v. Champion*, 37 Barb. (N. Y.) 563; *Vanamee v. Bank of Troy*, 8 Barb. (N. Y.) 315; s. c. 5 How. (N. Y.) Pr. 164; *Anderson v. Nicholas*, 5 Bosw. (N. Y.) 130; *Wilson v. Nason*, 4 Bosw. (N. Y.) 168; *Roberts v. Dillon*, 3 Daly (N. Y.) 52; *Piser v. Stearns*, 1 Hilt. (N. Y.) 88; *Weaver v. Barden*, 3 Lans. (N. Y.) 340; *Hoffman v. Carow*, 22 Wend. (N. Y.) 318; *Bassett v. Lederer*, 3 T. & C. (N. Y.) 675; s. c. 1 Hun (N. Y.) 279. In those cases, however, where the owner of goods furnishes another with *prima facie* evidence of a power of disposal, a *bonâ fide* purchaser will acquire a good title as against him. *McNeil v. Tenth Nat. Bank*, 46 N. Y. 329; s. c. 7 Am. Rep. 341; *Dows v. Greene*, 16 Barb. (N. Y.) 78; *Devlin v. Pike*, 5 Daly (N. Y.) 103; *Moore v. Miller*, 6 Lans. (N. Y.) 402; *Shearer v. Barrett*, Hill & Den. (N. Y.) 72; *Steelyards v. Singer*, 2 Hilt. (N. Y.) 98.

In order that a vendee may be protected as a bonâ fide purchaser, he must take the goods in the ordinary course of business paying, therefore, a valuable consideration for one to whom property has been delivered by the fraudulent vendee in payment

of a precedent debt, or in performance of an executory contract of sale made prior to the acquiring of possession thereof or of some evidence of title thereto by the latter, although a consideration was paid at the time of the contract is not a *bonâ fide* purchaser for value, and cannot hold the property as against the vendor. *Barnard v. Campbell*, 58 N. Y. 73; s. c. 17 Am. Rep. 208; overruling *Fenby v. Pritchard*, 2 Sandf. (N. Y.) 151; disapproving *Lee v. Kimball*, 45 Me. 172, and *Butters v. Haughwout*, 42 Ill. 18; and distinguishing *Winne v. McDonald*, 39 N. Y. 232. See, also, *Hyde v. Ellery*, 18 Md. 496, 501; *Sargent v. Sturm*, 23 Cal. 359; *Fletcher v. Drath*, 66 Mo. 126; *Pope v. Pope*, 40 Miss. 516; *Stevens v. Brennan*, 79 N. Y. 254, 258; *Weaver v. Barden*, 49 N. Y. 286; *Poor v. Woodburn*, 250 Vt. 235. Contra *Shufeldt v. Pease*, 16 Wis. 659. An attaching creditor is not a *bonâ fide* purchaser. *Thompson v. Rose*, 16 Conn. 71; s. c. 41 Am. Dec. 121; *Jordan v. Parker*, 56 Me. 557; *Gilbert v. Hudson*, 4 Me. (4 Greenl.) 345; *Whitman v. Merrill*, 125 Mass. 127; *Atwood v. Dearborn*, 83 Mass. (1 Allen) 483; s. c. 79 Am. Dec. 755; *Wiggin v. Day*, 75 Mass. (9 Gray) 97; *Buffington v. Gerrish*, 15 Mass. 156; s. c. 8 Am. Dec. 97; *Naugatuck Cutlery Co. v. Babcock*, 22 Hun (N. Y.) 481, 485; *Field v. Stearns*, 42 Vt. 106; *Hackett v. Callender*, 32 Vt. 97; *Poor v. Woodburn*, 25 Vt. 234; *Fitzsimmons v. Joslin*, 21 Vt. 129; s. c. 52 Am. Dec. 48.

A person buying with notice of the fraud of his vendor in obtaining the property is not a bonâ fide holder for the value. *Stearns v. Gage*, 79 N. Y. 102; *Meacham v. Collignon*, 7 Daly (N. Y.) 402; *Rateau v. Bernard*, 3 Blatchf. C. C. 244.

innocent, for no property has passed to himself from the true owner.⁴

§ 519. To these common-law rules, there is one statutory exception. Where the fraud by which the goods are obtained from the vendor is such as to enable him to succeed in prosecuting to conviction the fraudulent buyer as having been guilty of obtaining the goods by false and fraudulent pretences, he will be entitled, after such conviction, to recover his goods, even from a third person, who is a *bonâ fide* purchaser from the party committing the fraud. The statute and cases under it have already been reviewed, *ante*, Book I. Part I. Ch. 2, pp. 9, 10.¹

[It has, however, been recently decided that the statute has *no application to a case of false pre- [*394] tences where the property in the goods has passed. (*Vide Lindsay v. Cundy*, 1 Q. B. D. 348; and *Moyce v. Newington*, 4 Q. B. D. 32, *ante*, page 10.)²]

The early cases are not universally in accord with the principles above stated, and in more than one of them the property was held to have passed, although it was very plainly the intention of the vendor to transfer the title, as well as the possession, of the goods.

An assignee for the benefit of creditors is a *bonâ fide* purchaser and will be protected. *Ratcliffe v. Sangston*, 18 Md. 383; *Bussing v. Rice*, 56 Mass. (2 Cush.) 48; *Belding v. Frankland*, 8 Lea (Tenn.) 67, 72; *Donaldson v. Farwell*, 93 U. S. (3 Otto) 631; bk. 23, L. ed. 993; *Montgomery v. Bucyrus Machine Works*, 92 U. S. (2 Otto) 257; bk. 23, L. ed. 656.

⁴ *As to who may sell* see *ante*, bk. 1, ch. II. § 1. One in possession who has no title has no authority to sell; thus a fraudulent holder of a bill of lading cannot possess title to goods by endorsing it to a purchaser of value without notice of the fraud. *Kinsey v. Leggett*, 71 N. Y. 387; *Dows v. Greene*, 24 N. Y. 638; *Dows v. Perrin*, 16 N. Y. 325; *Brower v.*

Peabody, 13 N. Y. 121; *Western Trans. Co. v. Marshall*, 4 Abb. App. Dec. (N. Y.) 575; *Dean v. Yates*, 22 Ohio St. 388; *Decan v. Shipper*, 35 Pa. St. 239; s. c. 78 Am. Dec. 334; *Gurney v. Behrend*, 3 El. & Bl. 622; *Kingsford v. Merry*, 1 H. & N. 503; *Lickbarrow v. Mason*, 1 Smith Lead. Cas. (7th Am. Ed.) 1147; s. c. 2 T. R. 63; 1 H. Bl. 357; 6 East, 21.

¹ *Cundy v. Lindsay*, L. R. 3 App. Cas. 459; *Babcock v. Lawson*, L. R. 4 Q. B. Div. 394; *Lindsay v. Cundy*, L. R. 1 Q. B. Div. 338; *Horwood v. Smith*, 2 T. R. 750.

² *Cochran v. Stewart*, 21 Minn. 435. See *McNeil v. Tenth Nat. Bank*, 46 N. Y. 327; s. c. 7 Am. Rep. 341; *Fassett v. Smith*, 23 N. Y. 252, 366; *Mowrey v. Walsh*, 8 Cow. (N. Y.) 238.

In *Martin v. Pewtress*,³ decided in 1769; *Read v. Hutchinson*,⁴ in 1813; *Gladstone v. Hadwen*,⁵ in the same year; *Noble v. Adams*,⁶ in 1816; and the *Earl of Bristol v. Wilsmore*,⁷ in 1823, *dicta* are to be found as to the effect of fraud in preventing the property from passing to the purchaser, which are quite in opposition to the latter authorities, though in most, if not all, of these cases the decisions were quite correct.

The last-mentioned case was one in which a cheque had been given by the buyer on a bank in which he had no funds, and was decided on the authority of *Read v. Hutchinson*, *Noble v. Adams*, *supra*; and of *Rex v. Jackson*,⁸ in which a conviction for obtaining goods under false pretences (under the 30th Geo. II. Ch. 24) was upheld on proof that the accused had obtained the goods by giving in payment a cheque on a banker with whom he had no cash, and which he knew would not be paid.

§ 520. *Duff v. Budd*¹ was an action by a vendor against a common carrier to whom he had delivered goods, to be forwarded to Mr. James Parker, High Street, Oxford. The goods had been ordered by an unknown person, and there was no *James Parker* in that street, but there was a *William Parker*, a solvent tradesman, who refused the parcel. Soon after, a person came to the defendant's office and claimed the parcel as his own, and on paying the carriage it was delivered to him. He had on previous occasions received goods from the same office, directed to Mr. Parker, Oxford, to be left till called for. One of the grounds of [*395] defence * taken by Pell, Serjeant, was that the property in the goods had passed out of the plaintiff to the consignee. Dallas C. J. and Burrough J. did not notice the point, but Park J. said that the ground taken did "not apply to a case bottomed in fraud in which there had been no sale," and Richardson J. said, "there was clearly a prop-

³ 4 Burr. 2478.

⁴ 3 Camp. 352.

⁵ 1 M. & S. 517.

⁶ 7 Taunt. 59.

⁷ 1 B. & C. 514; and see *Loughnan v. Barry*, 6 Ir. R. C. L. 457.

⁸ 3 Brod. & B. 116.

¹ 3 B. & B. 177.

erty in the plaintiffs entitling them to sue, as they had been imposed on by a gross fraud."

§ 521. A few years later, a case almost identical in its features came before the same Court. *Stephenson v. Hart*¹ was, again, an action by a vendor against a common carrier. A purchaser bought goods from the plaintiff, and ordered them to be sent to J. West, 27 Great Winchester Street, London, and gave a spurious bill of exchange in payment. The vendor delivered the goods to the carrier to be forwarded to the above address. No person was found at the address, but a few days after the carrier received a letter signed "J. West," stating that a box had been addressed to him by mistake to Great Winchester Street, and asking that it should be forwarded to him at the Pea Hen, a public-house at St. Alban's. The box was so forwarded, and the person who sent for it, said it was for him, and stated its contents before opening it, thus showing that *the box had reached the person to whom it was addressed*. One ground of defence, again, was that upon the delivery to the carriers the property ceased to be in the vendor, and was vested in the consignee. Park J. held that the property had not passed, because West had never meant to pay for the goods, and the true question was "not what the *seller* meant to do, but what are the intentions of the *customer*. Did *he* mean to buy?" Burrough J. said that the property had never passed out of the consignor, giving no reason except that the transaction of West was a gross fraud; but Gaselee J. doubted strongly whether trover could lie when the carrier had delivered the goods to the person to whom they had been really consigned by the vendor.

§ 522. It is submitted that both these cases against the carriers are very doubtful authorities under the modern doctrine, which clearly holds that the property does pass, when the **vendor* intends it to pass, however fraudulent the device of the buyer to induce that intention.¹

¹ 4 Bing. 476.

¹ This expression of doubt is not withdrawn in the third edition of this

treatise. It seems to be further justified by the three cases since decided in the Exchequer, in all of which the

In *Heugh v. The London and North Western Railway Company*,² where the same question was involved under very similar circumstances, it was held that it was a question of fact for the jury whether the carrier had acted with reasonable care and caution with respect to the goods after their refusal at the consignee's address, and the Court refused to set aside a verdict for the defendant on that issue.

In *McKean v. McIvor*,³ the decision was also in favor of the carriers, and Bramwell B. expressed concurrence in the opinion of Gaselee J. who dissented in *Stephenson v. Hart*,⁴ *supra*.

§ 523. In *Irving v. Motley*,¹ the facts were, that one Dunn and a firm of Wallington and Co. had been engaged in a series of transactions, in which Dunn, as agent, purchased for them goods, on credit, and immediately resold at a loss, the purpose being to raise money for the business of Wallington and Co. Dunn was also an agent for the defendant Motley, who was entirely innocent of any knowledge of, or participation in, the transaction of Wallington and Co. Under these circumstances, Dunn, in behalf of Wallington and Co., applied to the defendant for an advance, which the latter agreed to make if secured by a consignment of goods. Thereupon Dunn, as agent of Wallington and Co., bought a parcel of wool from the plaintiff, on credit, and at once transferred it to Motley, as security for the advance. Wallington and Co. became bankrupt a few days after this transaction, and the plaintiff brought trover against Motley for the wool. A verdict was given for the plaintiff, the jury finding that the transaction was fraudulent, and that Motley knew nothing of the fraud, but that Dunn was [*397] his agent as well as that of Wallington and Co.

The Court refused to set aside the verdict, but the judges were not in accord as to the grounds. Tindal C.

defence of the carriers was successful, though the only one in which the point here suggested was taken into consideration was *Clough v. London and North Western Railway Co.*, L. R. 7 Ex. 26, *post*, 400.

² L. R. 5 Ex. 51.

³ L. R. 6 Ex. 36.

⁴ 4 Bing. 676.

¹ 7 Bing. 548.

J. said: "The ground set up here is that there was an *acting and an appearance of purchase* given to the transfer of these goods, which in truth and justice it did not really possess. Whether Dunn, as the agent of Wallington and Co., went into the market and got these goods into his possession, under such representation as may amount to obtaining goods under false pretences, it is not necessary to say, but it comes very near the case: it is under circumstances that place him and Messrs. Wallington in the light of conspirators to obtain possession of the goods. . . . At all events, it was left to a jury of merchants, and though they have acquitted the defendants of fraud, yet they involved them in the legal consequences, as it was a fraud *committed by their agent with a view to benefit them.*" Park J. agreed with the Chief Justice, but he expressed anxiety to explain *Noble v. Adams*, saying, that the Court did not hold, nor mean to hold in that case, that obtaining goods under false pretences was the *only* ground upon which the transaction could be held void. Gaselee J. was careful to confine the doctrine of the case before the court, to the special circumstances, saying: that it was "maintainable against the defendants, because they had constituted Dunn their agent, for the purpose of securing themselves, by getting a consignment of wool made to them from Wallington and Co.; and their agent having thought fit to procure that consignment by means of what the jury have found to be a fraud, however innocently the defendants may have acted, they cannot take any benefit from the misconduct of that agent." Alderson J. however, thought that the case was confused by treating it as one of principal and agent; that Dunn and Wallington were principals in a conspiracy to get the goods from the plaintiff, and therefore *no property passed out of Messrs. Irving.*

§ 524. In *Ferguson v. Carrington*,¹ goods were sold to defendant on credit, whereupon he immediately resold them at lower * prices, and the vendor brought [*398] *assumpsit* for the price before the maturity of the credit, on the ground that the defendant had manifestly

² 7 Taunt. 59.

¹ 9 B. & C. 59.

purchased with the preconceived design of not paying for them. Lord Tenterden C. J. non-suited the plaintiff, on the ground that by bringing an action on the contract, he affirmed it,² and was, therefore, bound to wait till the end of the credit, but that "if the defendant had obtained the goods with the *preconceived design of not paying for them, no property passed to him* by the contract of sale, and it was competent to the plaintiff to bring trover, and treat the contract as a nullity, and the defendant not as a purchaser of the goods, but as a person who had obtained tortious possession of them." Park J. concurred in this view.

It should not be overlooked that in this, as in several of the preceding cases, the action was between the true owner and the fraudulent buyer; that the language of the judges was intended to apply only in the case before them, and was not, therefore, so guarded in relation to the effect of the contract in transferring the property, as it would doubtless have been if the rights of innocent third parties had been in question.

§ 525. In *Load v. Green*,¹ the buyer purchased the goods on the 1st of July, they were delivered on the 4th, and a *fiat* in bankruptcy issued on the 8th. It is uncertain whether the act of bankruptcy had been committed prior to

² *Ratification by suit for price.*—Where, after discovery of the fraud, the vendor brings an action for the purchase price this is as matter of law an affirmation of the sale, and the vendor cannot thereafter set up title and claim the goods on the ground of the original fraud. *Bulkeley v. Morgan*, 46 Conn. 393; *Morford v. Peck*, 46 Conn. 380; *Dellone v. Hull*, 47 Md. 112; *Connihan v. Thompson*, 111 Mass. 270, 272; *Butler v. Hildreth*, 46 Mass. (5 Metc.) 49; *Peters v. Ballister*, 20 Mass. (3 Pick.) 495; *Kimball v. Cunningham*, 4 Mass. 502, 505; s. c. 3 Am. Dec. 230; *Stoutenburgh v. Konkle*, 15 N. J. Eq. (2 McCart.) 33, 41; *Schiffer v. Dietz*, 83 N. Y. 300; *Joslin v. Cowee*, 52 N. Y. 90; *Marsh v. Pier*,

4 Rawle (Pa.) 273; s. c. 26 Am. Dec. 131; *Mackinley v. McGregor*, 3 Whart. (Pa.) 369; s. c. 31 Am. Dec. 522; *Adler v. Fenton*, 65 U. S. (24 How.) 407, 411; bk. 16, L. ed. 696; *Dibblee v. Sheldon*, 10 Blatchf. C. C. 178; *Emma Silver Mining Co. Lim. v. Emma Co. of N. Y.*, 7 Fed. Rep. 401, 424; s. c. 10 Rep. 551; *Dalton v. Hamilton*, 1 Hannay (N. B.) 422. If after discovery of the fraud the vendor elects to avoid the contract, such election is conclusive. *Powers v. Benedict*, 88 N. Y. 605, 609; *Moller v. Tuska*, 87 N. Y. 166; *Morris v. Rexford*, 18 N. Y. 552; *Pence v. Langdon*, 99 U. S. (9 Otto) 578, 582; bk. 25, L. ed. 420; *Orme v. Broughton*, 10 Bing. 533.

¹ 15 M. & W. 216.

the purchase. The jury found that the buyer purchased with the fraudulent intention of not paying for the goods; and it was held, that even assuming the act of bankruptcy to have been committed after the purchase, "the plaintiff had a right to disaffirm it, to *revest* the property in the goods, and recover their value in trover against the bankrupt."²

[In *Ex parte Whittaker*, the buyer had committed an act of bankruptcy on the 1st of December, and on the 3d a

² 10 Ch. 446.

A vendor purchasing goods with a preconceived design of not paying for them obtains no property in the goods, although there was no fraudulent misrepresentation or false pretences. *Loeb v. Flash*, 65 Ala. 526; *Morrill v. Blackman*, 42 Conn. 324; *Ayres v. French*, 41 Conn. 142; *Thompson v. Rose*, 16 Conn. 71; s. c. 41 Am. Dec. 121; *Wabash St. L. & C. Ry. Co. v. Shryock*, 9 Ill. App. 323; *Oswego Starch Factory v. Lendrum*, 57 Iowa, 573; *Cross v. Peters*, 1 Me. (1 Greenl.) 376; s. c. 10 Am. Dec. 78; *Peters v. Hiles*, 48 Md. 506; *Harris v. Alcock*, 10 Gill & J. (Md.) 226; s. c. 32 Am. Dec. 158; *Kline v. Baker*, 99 Mass. 253, 255; *Dow v. Sanborn*, 85 Mass. (3 Allen) 181, 182; *Wiggin v. Day*, 75 Mass. (9 Gray) 97; *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 307, 311, 312; s. c. 23 Am. Dec. 607; *Shipman v. Seymour*, 40 Mich. 274; *Fox v. Webster*, 46 Mo. 181; *Bidault v. Wales*, 19 Mo. 36; s. c. 59 Am. Dec. 327; *Stewart v. Emerson*, 52 N. H. 301; *Wright v. Brown*, 67 N. Y. 1; *Goulding v. Davidson*, 26 N. Y. 606; *Hennequin v. Naylor*, 24 N. Y. 139; *Nichols v. Michael*, 23 N. Y. 264; *Hall v. Naylor*, 18 N. Y. 588, 589; *Nichols v. Pinner*, 18 N. Y. 295; *Dows v. Perrin*, 16 N. Y. 333; *Townsend v. Bogart*, 11 Abb. (N. Y.) Pr. 355; *Van Kleek v. Leroy*, 4 Abb. (N. Y.) Pr. N. S. 433; *Johnson v. Monell*, 2 Abb. App. Dec. (N. Y.) 470; *Barnard v. Campbell*, 65 Barb. (N. Y.) 286; s. c. 58 N. Y. 73; 17 Am. Rep. 208; *Roth v. Palmer*, 27 Barb.

652; *Buckley v. Artcher*, 21 Barb. (N. Y.) 585; *Van Neste v. Conover*, 20 Barb. 548; *Michell v. Worden*, 20 Barb. (N. Y.) 253; *Hunter v. Hudson River Iron & Mach. Co.*, 20 Barb. (N. Y.) 501; *Wheaton v. Baker*, 14 Barb. (N. Y.) 594; *McKnight v. Morgan*, 2 Barb. (N. Y.) 173; *King v. Phillips*, 8 Bosw. 603; *Meacham v. Collignon*, 7 Daly (N. Y.) 402; *Bigelow v. Heaton*, 6 Hill (N. Y.) 43; *Ash v. Putnam*, 1 Hill (N. Y.) 302; *Ladd v. Moore*, 3 Sandf. (N. Y.) 591; *MacKinley v. McGregor*, 3 Whart. (Pa.) 369; s. c. 31 Am. Dec. 522; *Donaldson v. Farwell*, 93 U. S. (3 Otto) 631; bk. 23, L. ed. 993; *Biggs v. Barry*, 2 Curt. C. C. 262; *Parker v. Byrnes*, 1 Low. C. C. 539, 542; *Foot v. Jones* (N. Y. Supre. Ct. Jan. 1870) 1 Alb. L. J. 123; *Davis v. McWhirter*, 40 Up. Can. Q. B. 598; *Ex parte Whittaker*, L. R. 10 Ch. App. 446.

Some of the courts hold, however, that a purchaser's knowledge of his insolvency, coupled with its concealment, is not sufficient to render the sale fraudulent and voidable, even where there is a distinct purpose not to pay for the goods; unless there was actual artifice intended to deceive the vendor. See *Bell v. Ellis*, 33 Cal. 620; *Nichols v. Michael*, 23 N. Y. 274; s. c. 80 Am. Dec. 259; *Backentoss v. Speicher*, 31 Pa. St. 324; *Smith v. Smith*, 21 Pa. St. 367. However, see *Stewart v. Emerson*, 52 N. H. 301.

Concealment of insolvency.—If a purchaser, in order to obtain goods on credit, conceals his insolvency not

bankruptcy petition had been filed. On the 5th of December the buyer purchased wool at an auction, and the vendor

intending to pay for them, it will be a fraud on the vendor. See *Nichols v. Pinner*, 18 N. Y. 306; *Buckley v. Artcher*, 21 Barb. (N. Y.) 589; *Johnson v. Monell*, 2 Keyes (N. Y.) 663; *Chaffee v. Fort*, 2 Lans. (N. Y.) 87; *Rawdon v. Blatchford*, 1 Sandf. Ch. (N. Y.) 347. But it is held in some cases that a mere knowledge on the part of the vendee that he was insolvent and unable to pay for the goods, is not sufficient, but that there must exist an actual intention not to pay for them. See *Morrill v. Blackman*, 42 Conn. 324; *Powell v. Bradlee*, 9 Gill & J. (Md.) 220; *Cross v. Peters*, 1 Me. (1 Greenl.) 378; s. c. 10 Am. Dec. 78; *Morse v. Shaw*, 124 Mass. 59; *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 307; s. c. 23 Am. Dec. 607; *Shipman v. Seymour*, 40 Mich. 274; *Klein v. Rector*, 57 Miss. 538; *Hennequin v. Naylor*, 24 N. Y. 139; *Johnson v. Monell*, 3 Abb. App. Dec. (N. Y.) 470; *Ellison v. Bernstein*, 60 How. (N. Y.) Pr. 145; *Fish v. Payne*, 7 Hun (N. Y.) 586; *Byrd v. Hall*, 2 Keyes (N. Y.) 646; *Lloyd v. Brewster*, 4 Paige Ch. (N. Y.) 537; s. c. 27 Am. Dec. 88; *Andrew v. Dieterich*, 14 Wend. (N. Y.) 31; *Talcott v. Henderson*, 31 Ohio St. 162; s. c. 24 Am. Rep. 501; *Biddle v. Black*, 99 Pa. St. 380; *Rodman v. Thalheimer*, 75 Pa. St. 232; *Backentoss v. Speicher*, 31 Pa. St. 324; *Smith v. Smith*, 21 Pa. St. 367; *Redington v. Roberts*, 25 Vt. 694, 695; *Hodgeden v. Hubbard*, 18 Vt. 504; s. c. 46 Am. Dec. 167; *Garbutt v. Bank of Prairie du Chien*, 22 Wis. 384; *Biggs v. Barry*, 2 Curt. C. C. 259; *Conyers v. Ennis*, 2 Mason C. C. 236; *Ontario Copper Lightning Rod Co. v. Hewitt*, 29 Up. Can. C. P. 491.

Yet it would seem that a failure to disclose insolvency when known will be evidence of an intent not to pay; but such evidence is only pre-

sumptive and may be rebutted. *Burrill v. Stevens*, 73 Me. 395; s. c. 40 Am. Dec. 366; *Kloppenstein v. Mulcahy*, 4 Nev. 296; *Wright v. Brown*, 67 N. Y. 4; *Nichols v. Pinner*, 18 N. Y. 295; *Schufeldt v. Schnitzler*, 21 Hun (N. Y.) 462; *Talcott v. Henderson*, 31 Ohio St. 162; s. c. 27 Am. Rep. 501; *Belding v. Frankland*, 8 Lea (Tenn.) 67; s. c. 41 Am. Rep. 630; *Redington v. Roberts*, 25 Vt. 686; *Garbutt v. Bank of Prairie du Chien*, 22 Wis. 384.

An intent not to pay for goods purchased may be established by evidence of other fraudulent purchases, part of the same scheme of fraud; or by the turning of the property over to another creditor, by its secretion as soon as purchased, or by any other conduct or circumstances indicating a design to defraud. See *Lynde v. McGregor*, 95 Mass. (13 Allen) 172; *Dow v. Sanborn*, 85 Mass. (3 Allen) 181; *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 307; s. c. 23 Am. Dec. 607; *Moyce v. Newington*, 4 Q. B. Div. 35.

Where the vendee purchases without the intention of paying, the vendor may avoid the sale as fraudulent. *Bell v. Ellis*, 33 Cal. 620; *Seligman v. Kalkman*, 8 Cal. 207; *Ayres v. French*, 41 Conn. 142, 153, 155; *Thompson v. Rose*, 16 Conn. 71, 81; s. c. 41 Am. Dec. 121; *Mears v. Waples*, 3 Houst. (Del.) 581; *Allen v. Hartfield*, 76 Ill. 358; *Lane v. Robinson*, 18 B. Mon. (Ky.) 623; *Burrill v. Stevens*, 73 Me. 395; s. c. 40 Am. Rep. 366; *Peters v. Hilles*, 48 Md. 506, 512; *Powell v. Bradlee*, 9 Gill & J. (Md.) 220, 248, 278; *Dow v. Sanborn*, 85 Mass. (3 Allen) 181; *Wiggin v. Day*, 75 Mass. (9 Gray) 97; *Shipman v. Seymour*, 40 Mich. 274, 283; *Doyle v. Mizner*, 40 Mich. 160; *Fox v. Webster*, 46 Mo. 181; *Bidault v. Wales*, 19 Mo. 36; *Kloppenstein v. Mulcahy*,

being unaware of his pecuniary circumstances, allowed him to remove it without paying the price. The buyer made no *representation at the time as to payment. [*399] Held, on these facts that it was not clear that the buyer purchased with the intention of not paying for the goods, and that the vendor, therefore, was not entitled to have the contract rescinded.]

§ 526. In the early case of *Parker v. Patrick*,¹ the King's Bench held, in 1793, that where goods had been obtained on false pretences, and *the guilty party had been convicted* the title of the original owner could not prevail against the rights of a pawnbroker, who had made *bonâ fide* advances on them to the fraudulent possessor. This case has been much questioned, but the only difficulty in it may be overcome by adopting the suggestion made by Parke B. in *Load v. Green*, namely, that the false pretences were successful in causing the owner to make a *sale* of the goods, in which event an innocent third person would be entitled to hold them against him. Several of the judges made remarks on the case, in *White v. Garden*,² and it was cited by the Court as one of the acknowledged authorities on this subject in *Stevenson v. Newnham*.³

§ 527. In *Powell v. Hoyland*,¹ decided in 1851, Parke B. expressed a strong impression that trespass would not lie

4 Nev. 296; *Stewart v. Emerson*, 52 N. H. 301, 318; *Stoutenburgh v. Konkle*, 15 N. J. Eq. (2 McCart.) 33; *Wright v. Brown*, 67 N. Y. 1; *Devoe v. Brandt*, 53 N. Y. 462; *Hennequin v. Naylor*, 24 N. Y. 139; *Schufeldt v. Schnitzler*, 21 Hun (N. Y.) 462; *Johnson v. Monell*, 2 Keyes (N. Y.) 665; *Byrd v. Hall*, 2 Keyes (N. Y.) 646; *Talcott v. Henderson*, 31 Ohio St. 162; s. c. 27 Am. Rep. 501; *Mullicken v. Millar*, 12 R. I. 296; *Belding v. Frankland*, 8 Lea (Tenn.) 67; s. c. 41 Am. Rep. 630; *Donaldson v. Farwell*, 93 U. S. (3 Otto) 631; bk 23, L. ed. 993; *Parker v. Byrnes*, 1 Low. C. C. 539, 542; *Davis v. Stewart*, 3 McC. C. C. 174; s. c. 8 Fed. Rep.

803; *Davis v. McWhirter*, 40 Up. Can. Q. B. 598.

A sale of goods tortiously obtained without the owner's consent gives the purchaser no title against the owner, although purchased for a fair consideration in the usual course of trade, and without any suspicious circumstances to awaken inquiry. *Barker v. Dinsmore*, 72 Pa. St. 427; s. c. 13 Am. Rep. 697.

¹ 5 T. R. 175.

² 20 L. J. C. P. 167, and 10 C. B. 919.

³ 13 C. B. 285, and 22 L. J. C. P. 110; and see *Moyce v. Newington*, 4 Q. B. D. 35, *ante*, p. 10.

¹ 6 Ex. 67-72.

for goods obtained by fraud, "because fraud does not transfer the property, though liable to be divested by the person deceived, if he chooses to consider the property as not having vested."

In *White v. Garden*,² the innocent purchaser from a fraudulent vendee was protected against the vendor, and all the judges expressed approval of the opinion given by Parke B. in *Load v. Green*.

In *Stevenson v. Newnham*,³ in 1853, Parke B. again gave the unanimous opinion of the Exchequer Chamber, that the effect of fraud "is not absolutely to avoid the contract or transaction which has been caused by that fraud, but to render it voidable at the option of the party defrauded. The *fraud only gives a right to rescind*. In the first instance, *the property passes* in the subject-matter. An [*400] *innocent purchaser from the fraudulent possessor may acquire an indisputable title to it though it is *voidable* between the original parties."

§ 528. This decision was not impugned, when the Exchequer Chamber, in *Kingsford v. Merry*,¹ in 1856, held that the defendant, an innocent third person, who had made advances on goods, could not maintain a defence against the plaintiffs, the true owners. In that case, the party obtaining the advances had procured the delivery of the goods to himself by falsely representing that a sale had been made to him by the owner's agents, the Court saying on these facts that the parties "never did stand in the relation of vendor and vendee of the goods, and there was no contract between them which the plaintiffs might either affirm or disaffirm." This decision reversed the judgment of the Exchequer of Pleas,² but it was explained by Bramwell B. in *Higgins v. Burton*, *infra*, and by Lord Chelmsford, in *Pease v. Gloaher*, *infra*, that this was only by reason of a changed state of facts, and that the principles on which both Courts proceeded were really the same.

² 20 L. J. C. P. 167, and 10 C. B. 919.

¹ 1 Ch. & N. 503; 26 L. J. Ex. 83.

³ 13 C. B. 285, and 22 L. J. C. P.

² 11 Ex. 577; 25 L. J. Ex. 166.

§ 529. In *Clough v. The London and North Western Railway Company*,¹ the Exchequer Chamber gave an important decision upon several questions involved in the subject now under examination. The decision was prepared by Blackburn J. though delivered by Mellor J.² The facts were that the London Pianoforte Company sold certain goods to one Adams, on the 18th of May, 1866, for which he paid 68*l.* in cash, and gave his acceptance at four months for 135*l.* 8*s.*, the whole residue of the price. He directed the vendors to forward the goods by the defendants' railway to the address of the plaintiff at Liverpool, whom he represented to be his shipping agent. On the arrival of the goods in Liverpool the defendants could not find Clough at the address given by Adams, and in a letter to the vendors, the Pianoforte Company, the defendants stated this fact, and *asked for instructions. Almost at the same [*401] time the vendors learned that Adams was a bankrupt, and at 9.30 A.M., on the 22d of May, they sent notice to the defendants *in London*, to stop the goods *in transitu*; but before this notice reached *Liverpool*, the plaintiff had *there* demanded the goods, and the defendants had agreed to hold them as warehousemen for him, thus putting an end to the transitus. The vendors nevertheless gave an indemnity to the defendants, and obtained delivery of the goods to themselves, so that they were the real defendants in the case. The plaintiff demanded the goods of the defendants, and on hearing that they had been returned to the vendors, brought his action on the 2d of June, in three counts: 1. trover; 2. against them as warehousemen; 3. as carriers. Up to the date of the trial, the vendors were *treating the contract as subsisting*, and relying on the right to stop *in transitu*; but on the cross-examination of the plaintiff and Adams at the trial, the defendants elicited sufficient facts to show a strong case of concerted fraud between the two to get possession of the goods, in order to sell them at auction, and retain the proceeds without paying for them. They were

¹ L. R. 7 Ex. 26.

J. on the argument of a cause in the Exchequer Chamber.

² So stated to the author by Mellor J. in the presence of Blackburn

allowed to file a plea to that effect, and the jury found that the fraud was proved.

The Exchequer of Pleas decided in favor of the plaintiff, on the ground that the vendors had not elected to set aside the contract nor offered to return the cash and acceptance, before delivering the plea of fraud at the trial after the cross-examination, and had up to that time treated the contract as subsisting: and further, on the ground that the rescission came too late after the plaintiff had acquired a vested cause of action against the defendants.

§ 530. On these facts it was held:—

1st. That the property in the goods passed by the contract of sale: that the contract was not void, but only voidable, at the election of the defrauded vendor.

2d. That the defrauded vendor has the right to this election at any time after knowledge of the fraud, until he has affirmed the sale by express words or unequivocal acts.

[*402] * 3d. That the vendor *may keep the question open* as long as he does nothing to affirm the contract; and that so long as he has made no election he retains the right to avoid it, subject to this—that if while he is deliberating an innocent third party has acquired an interest in the property, or if, in consequence of his delay, the position even of the wrong-doer is affected, he will lose his right to rescind.

4th. That the vendor's election was properly made by a plea claiming the goods on the ground that he had been induced to part with them by fraud, and there was no necessity for any antecedent declaration or act *in pais*.

5th. That the vendor was not bound in his plea to tender the return of the money and acceptance, because they had been received, not from the plaintiff, but from Adams, who was no party to the action.

And, finally, that on the whole case the defendants were entitled to the verdict.¹

¹ These principles were re-affirmed by the Ex. Ch. in *Morrison v. The Universal Marine Ins. Co.*, L. R. 8

Ex. 197, reversing the judgment of the Court of Exchequer, ib. 40.

§ 531. It is not necessary that there should be a judgment of Court in order to effect the avoidance of a contract, when the deceived party repudiates it. The rescission is the legal consequence of his election to reject it, and takes date from the time at which he announces this election to the opposite party. Thus, in *The Reese River Company v. Smith*,¹ the House of Lords held the defendant entitled to have his name removed from the list of contributory shareholders in the plaintiff's company, although his name was on the register when the company was ordered to be wound up; on the ground that he had, prior to the winding-up order, notified his rejection of the shares, and commenced proceedings to have his name removed. On this ground the case was distinguished from *Oakes v. Turquand*.²

§ 532. In *Higgins v. Burton*,¹ a discharged clerk of one of plaintiffs' customers fraudulently obtained from plaintiffs * goods in the name and as being for the [*403] account of the customer, and sent them at once to defendant, an auctioneer, for sale. Held, that there had been no sale, but a mere obtaining of goods from plaintiff on false pretences, that no property passed, and that defendant was liable in trover. Plainly in this case the plaintiffs, although delivering the possession, had no intention of transferring the property to the clerk, and the latter, therefore, could transfer none to the auctioneer.

In *Hardman v. Booth*,² the plaintiff went to the premises of Gandell and Co., a firm not previously known to him, but of high credit, to make sale of goods, and was there received by Edward Gandell, a clerk, who passed himself off as a member of the firm, and ordered goods, which were supplied, but which Edward Gandell sent to the premises of Gandell and Todd, in which he was a partner. The plaintiff knew nothing of this last-named firm, and thought he was selling to "Gandell & Co." The goods were pledged by Gandell and Todd

¹ L. R. 4 H. L. 64; 2 Ch. 604.

² L. R. 2 H. L. 325.

¹ 26 L. J. Ex. 342.

² 1 H. & C. 803; 32 L. J. Ex. 105; *Hollins v. Fowler*, L. R. 7 H. L. 757; *Ex parte Barnett*, 3 Ch. D. 123.

with the defendant, an auctioneer, who made *bond fide* advances on them. The plaintiff's action was trover, and was maintained, all the judges holding that there had been no contract, that the property had not passed out of the plaintiff, and that the defendant was therefore liable for the conversion.

§ 533. [And in *Lindsay v. Cundy*,¹ the same principle was applied. It appeared that a person named Alfred Blenkarn had hired a room in a house looking into Wood Street, Cheapside, and from there had written to the plaintiffs, who were manufacturers, proposing to purchase goods of them. The letters were headed "37, Wood Street, Cheapside," and the signature, "Blenkarn & Co.," was written so as to resemble the name "Blenkiron & Co." There was a firm of good repute who carried on business at 123, Wood Street, under the style of "W. Blenkiron & Son." The [*404] plaintiffs, *who were aware of the reputation of the firm of W. Blenkiron & Son, but did not know the number of their house of business, sent the goods addressed to "Messrs. Blenkiron & Co., 37, Wood Street, Cheapside." Blenkarn sold some of the goods thus fraudulently obtained to the defendants, who were *bond fide* purchasers for value, and who resold them in the ordinary course of business. Blenkarn was afterwards convicted of the fraud. In an action for the conversion of the goods, it was held by the House of Lords, affirming the decision of the Court of Appeal, that as the plaintiffs had no knowledge of, and never intended to deal with, Blenkarn, no contract of sale had ever existed between them; that the only persons with whom they had intended to deal were the well-known firm of Blenkiron & Co.; that the property in the goods, therefore, remained in the plaintiffs, and the defendants were liable for their value.]

§ 534. In 1866, *Pease v. Gloahec*,¹ on appeal from the Admiralty Court, was twice argued by very able counsel. After

¹ 3 App. Cas. 459; *sub nom.* *Cundy v. Lindsay*; s. c. 2 Q. B. D. 96, C. A.; 1 Q. B. D. 348.

¹ L. R. 1 P. C. 220; 3 Moo. P. C. N. S. 566. And see *Oakes v. Turquand*, L. R. 2 H. L. 325.

advisement, the Privy Council, composed of Lord Chelmsford, Knight Bruce, and Turner, L.JJ., Sir J. T. Coleridge, and Sir E. V. Williams, delivered an unanimous decision.

The principle laid down in *Kingsford v. Merry*, as stated by the Court of Exchequer (and not affected by the reversal of their judgment in the Exchequer Chamber), was affirmed to be the rule of law, viz.: "Where a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is, that if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor."

§ 535. * [*Babcock v. Lawson*,¹ where the plaintiffs [*405] were pledgees and not the owners of the goods, illustrates the same principle. The plaintiffs had made advances to Denis Daly and Sons on the security of certain flour, warehoused in the plaintiffs' name. The defendants subsequently made advances to Denis Daly and Sons on the security of a pledge of the same flour, in ignorance of the prior transaction with the plaintiffs, and Denis Daly and Sons, by a fraudulent representation that they had sold the flour to the defendants, obtained a delivery order for it, which they gave to the defendants. The defendants accordingly obtained possession of the flour, and, the advances made by them not being repaid, sold it. The plaintiffs sued the defendants for conversion:—*Held*, that assuming the plaintiffs, as pledgees, to have ever had a special property in the flour, they must be taken to have intended to revest the whole property in Denis Daly and Sons, in order that they might transfer it to the defendants as purchasers; and that although the plaintiffs might have revoked the delivery order as being procured by fraud, so long as the flour remained

¹ 4 Q. B. D. 394, affirmed 5 Q. B. D. 284, C. A.

in the hands of Denis Daly and Sons, yet when the property in the flour had been transferred to the defendants for good consideration, the title of the latter was indefeasible. Cockburn C. J. holding the analogy between the case under consideration and one where a vendor is induced to part with the property by fraud to be complete: and the decision of the Queen's Bench Division was affirmed on appeal.

And in this case, and in *Moyce v. Newington*,² Cockburn C. J. lays down in the broadest possible manner that the Courts were prepared to hold, that when one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud, citing with approval the decision of the Supreme Court of Judicature of the State of New York in [*406] *the case of *Root v. French*,³ the preference thus given to the right of the innocent purchaser is treated as an exception to the general law, and is rested on the above general principle of equity.]

§ 536. It is a fraud on the vendor to prevent other persons from bidding at an auction of the goods sold, and where the buyer had, by an address to the company assembled at the auction, persuaded them that he had been wronged by the vendor, and that they ought not to bid against the buyer, the purchase by him was held to be fraudulent and void.¹

² 4 Q. B. D. 32, *ante*, p. 10.

³ 13 Wend. (N. Y.) 570. And see the American decisions, cited *post*, § 544 *passim*.

¹ *Fuller v. Abrahams*, 3 B. & B. 116.

Deterring others from bidding.—Where a purchaser at a public sale by word or act deters others from bidding such will be fraudulent and will be set aside on application to the court. *Haynes v. Crutchfield*, 7 Ala. 189; *Loyd v. Malone*, 23 Ill. 43; *Pike v. Balch*, 38 Me. 302; s. c. 61 Am. Dec. 248; *Gardiner v. Morse*, 25 Me. 140; *Phippen v. Stickney*, 44 Mass. (3 Metc.) 387, 388; *Newman v. Meek*, 1 Freeman Ch. (Miss.) 441; *Hook*

v. Turner, 22 Mo. 333; *Wooton v. Hinkle*, 20 Mo. 290; *Gulick v. Ward*, 10 N. J. L. (5 Halst.) 87; s. c. 18 Am. Dec. 389; *Atcheson v. Mallon*, 43 N. Y. 147; *Meech v. Bennett, Hill & Den.* (N. Y.) 192; *People v. Lord*, 6 Hun (N. Y.) 390; *Thompson v. Davies*, 13 Johns. (N. Y.) 112; *Wilbur v. How*, 8 Johns. (N. Y.) 444; *Doolin v. Ward*, 6 Johns. (N. Y.) 194; *Troup v. Wood*, 4 Johns. Ch. (N. Y.) 228, 254; *Jones v. Caswell*, 3 Johns. Cas. (N. Y.) 29; s. c. 2 Am. Dec. 134; *Trust v. Delaplaine*, 3 E. D. Smith, (N. Y.) 219; *Smith v. Greenlee*, 2 Dev. (N. C.) L. 126; s. c. 18 Am. Dec. 564; *Dudley v. Little*, 2 Ohio, 505; s. c. 15 Am. Dec. 575; *Jackson*

§ 537. Where the fraud on the vendor consists in the defendant's inducing him by false representations to sell goods to an insolvent third person, and then obtaining the goods from that third person, the price may be recovered from the defendant as though he had bought directly in his own name, for his possession of the vendor's goods unaccounted for implies a contract to pay for them, and he cannot account for his possession, save through his own fraud, which he is not permitted to set up in defence.¹

In *Biddle v. Levy*,² the defendant told plaintiff that he was about to retire from business in favor of his son, who was a youth of seventeen years of age, but would watch over him. He then introduced his son to the plaintiff, who sold to the son goods to the value of 800*l*. The representations were false and fraudulent, and Gibbs C. J. held an action *for goods sold and delivered* to be maintainable against the father.

v. Morter, 82 Pa. St. 291; *Slingluff v. Eckel*, 24 Pa. St. 472; *Fenner v. Tucker*, 6 R. I. 551; *Martin v. Ranlett*, 5 Rich. (S. C.) L. 541; s. c. 57 Am. Dec. 770; *Hamilton v. Hamilton*, 2 Rich. (S. C.) Eq. 355; s. c. 46 Am. Dec. 58; *Johnson v. LaMotte*, 6 Rich. (S. C.) Eq. 847; *Wood v. Hudson*, 5 Munf. (Va.) 423; *Cocks v. Izard*, 74 U. S. (7 Wall.) 559; bk. 18, L. ed. 275; *Slater v. Maxwell*, 73 U. S. (6 Wall.) 268; bk. 18, L. ed. 798; *Piatt v. Oliver*, 1 McL. C. C. 295; *Rodgers v. Rodgers*, 13 Grant (Ont.) 143; *Raynes v. Crowder*, 14 Up. Can. C. P. 111; *Re Carew's Estate*, 4 Jur. N. S. 1290; s. c. 26 Beav. 187. Combinations amongst bidders to prevent competition are fraudulent; and where a sale is made under such circumstances it will be set aside. *Jenkins v. Frink*, 30 Cal. 586; *Gardiner v. Morse*, 25 Me. 140; *Phippen v. Stickney*, 44 Mass. (3 Metc.) 384; *Morris v. Woodward*, 25 N. J. Eq. (10 C. E. Gr.) 32; *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. (5 C. E. Gr.) 159; *Marie v. Garrison*, 83

N. Y. 14, 28; *Fenner v. Tucker*, 6 R. I. 551; *Slingluff v. Eckel*, 24 Pa. St. 472; *Kearney v. Taylor*, 56 U. S. (15 How.) 494, 521; bk. 14, L. ed. 787. But it would seem that an honest agreement among bidders that one only shall bid may be valid. See *Jenkins v. Frink*, 30 Cal. 586; *Switzer v. Skiles*, 8 Ill. (3 Gilm.) 529; s. c. 44 Am. Dec. 723; *Gardiner v. Morse*, 25 Me. 140; *Phippen v. Stickney*, 44 Mass. (3 Metc.) 387; *Marie v. Garrison*, 83 N. Y. 14; *Wolfe v. Luyster*, 1 Hall (N. Y.) 146; *Dick v. Cooper*, 24 Pa. St. 217; s. c. 64 Am. Dec. 652; *Smull v. Jones*, 1 Watts & S. (Pa.) 128; *Jenkins v. Hogg*, 2 Treadw. (S. C. Const.) 821; *McMinn v. Phipps*, 3 Sneed (Tenn.) 196; *Allen v. Stephanes*, 18 Tex. 658; *Slater v. Maxwell*, 73 U. S. (6 Wall.) 268; bk. 18, L. ed. 796; *Kearney v. Taylor*, 56 U. S. (15 How.) 519, 31; bk. 14 L. ed. 796; *Brown v. Fisher*, 9 Grant (Ont.) 423; *Crooks v. Davis*, 6 Grant (Ont.) 317.

¹ *Hill v. Perrott*, 3 Taunt. 274.

² 1 Stark. 20.

These two cases probably rest on the principle that the nominal purchasers were secret agents buying for the parties committing the fraud, who were really the undisclosed principals.⁸

§ 538. Where, however, the fraud on the vendor is effected by means of assurances given by a third person of the [*407] buyer's solvency and ability, the proof that such assurances were made must be in writing, as required by the 6th section of Lord Tenterden's Act (9 Geo. IV. c. 14), which provides "that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain *credit*, money, or *goods* upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

The construction of this section was much debated in the case of *Lyde v. Barnard*,¹ in which the judges of the Exchequer were equally divided, but the case had no reference to a sale of goods. In *Haslock v. Ferguson*,² the action was against the defendant for an alleged fraudulent declaration to the plaintiff that one Barnes was of fair character, by which representation the plaintiff was induced to sell goods to Barnes, the proceeds of which were partly applied to the benefit of the defendant. The Court held that parol evidence of the alleged representation was inadmissible, overruling a distinction which Sir John Campbell, for the plaintiff, attempted to support, "that the gist of the action was not the misrepresentation of character, but the wrongful acquisition of property by the defendant."

In *Devaux v. Steinkeller*,³ it was held that a representation made by a partner of the credit of his firm was a representation of the credit of "another person" within the

⁸ *Thompson v. Davenport*, 2 Sm. L. C. at p. 387.

¹ This word "upon" is perhaps a mistake for "thereupon:" perhaps the words ought to be "money or

goods upon credit." See remarks of the judges in *Lyde v. Barnard*, 1 M. & W. 101.

² 7 A. & E. 86.

³ 6 Bing. N. C. 84.

meaning of this statute; and in *Wade v. Tatton*,⁴ in the Exchequer Chamber, that where there were both verbal and written representations, an action will lie if the written *representations were a material part of the inducement to give credit. [*408]

§ 539. The effect of concealment or false representations made by the buyer with a view to induce the owner to take less for his goods than he would otherwise have done, does not appear to have been often considered by the Courts. Chancellor Kent carries the doctrine on the subject of fraud much further than could be shown to be maintainable by decided cases, and states it in broader terms than are deemed tenable by the later editors of his Commentaries.¹ Under the head of "Mutual Disclosures," he lays down, in relation to sales, the proposition that, "as a general rule, *each party* is bound to communicate to the other his knowledge of the material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation."²

§ 540. The courts of equity even fall far short of this principle, and both Lord Thurlow and Lord Eldon held that a *purchaser* was not bound to acquaint the vendor with any latent advantage in the estate. In *Fox v. Mackreth*,¹ Lord Thurlow was of opinion that the purchaser was not bound to disclose to the seller the existence of a mine on the land, of *which he knew the seller was ignorant*, and that a Court of Equity could not set aside the sale, though the estate was

⁴ 25 L. J. C. P. 240. See, also, *Swan v. Phillips*, 8 A. & E. 745; *Turnley v. McGregor*, 6 M. & S. 46; *Pasley v. Freeman*, T. R. 51.

¹ 2 Kent, 540; Com. 483 (12th ed.).

² *Vendor need not disclose to the seller facts regarding which information is equally open to both.* *Prescott v. Wright*, 70 Mass. (10 Gray) 461, 464; *Dambmann v. Schulting*, 75 N. Y. 55, 62; *Smith v. Countryman*, 30 N. Y. 655, 670, 681; *Carpenter v. Danforth*, 52 Barb. (N. Y.) 581; *Paul v. Hadley*, 23 Barb. (N. Y.) 521;

Bench v. Sheldon, 14 Barb. (N. Y.) 66; *Hadley v. Clinton Co.*, 13 Ohio St. 502; *Butler's Appeal*, 26 Pa. St. 63; *Kintzing v. McElrath*, 5 Pa. St. 467; *Gartner v. Barnitz*, 1 Yeates, (Pa.) 307; *Fisher v. Budlong*, 10 R. I. 525; *Howard v. Gould*, 28 Vt. 523; s. c. 67 Am. Dec. 728; *Laidlaw v. Organ*, 15 U. S. (2 Wheat.) 178; bk. 4, L. ed. 214.

¹ 2 Bro. C. C. 400. For the judgment of Lord Thurlow, see 2 Cox, Eq. Cas. 320.

purchased for a price of which the mine formed no ingredient.² Lord Eldon approved this ruling in *Turner v. Harvey*.³ But in the latter case Lord Eldon, also, held that if the least word be dropped by the purchaser to *mislead* the vendor in such a case, the latter will be relieved; and his Lordship accordingly decided that the agreement for the sale in that case should be given up to be cancelled. The facts were that the purchaser of a reversionary interest had concealed from the seller that a death had occurred by which the value of the reversionary interest was materially increased.

[*409] § 541. * At common law, the only case decided in banco, that has been found on this point is *Vernon v. Keys*,¹ in which the declaration was in case, and a verdict was given for the plaintiff on the third count, which alleged that the plaintiff, being desirous of selling his interest in the business, stock-in-trade, &c., in which he was engaged with defendant, was deceived by the fraudulent representation of the defendant, pending the treaty for the sale, that the defendant was about to enter into partnership to carry on the business with other persons *whose names defendant refused to disclose*, and that *these persons* would not consent to give plaintiff a larger price than 4500*l.* for his share, while the truth was that these persons were willing that the defendant should give as much as 529*l.* 8*s.* 6*d.* The judgment in favor of plaintiff was arrested, Lord Ellenborough giving the opinion of the Court after advisement. His Lordship said that the cause of action as alleged amounted to nothing more than a *false reason* given by the defendant for his limited offer, and that this could not maintain the verdict, unless it was shown "that in respect of some consideration or other, existing between the parties to the treaty, or upon some general rule or principle of law, the party treating

² *Livingston v. Peru Iron Co.*, 2 Paige Ch. (N. Y.) 390; *Butler's Appeal*, 26 Pa. St. 63; *Harris v. Tyson*, 24 Pa. St. 347; s. c. 64 Am. Dec. 661; *Kintzing v. McElrath*, 5 Pa. St. 467; *Smith v. Beatty*, 2 Ired. (N. C.) Eq. 456. See *Stevens v. Fuller*, 8 N. H. 463; *Fisher v. Budlong*, 10 R. I. 525,

527; *Paddock v. Strobridge*, 29 Vt. 470; *Howard v. Gould*, 28 Vt. 523; s. c. 67 Am. Dec. 728; *Laidlaw v. Organ*, 15 U. S. (2 Wheat.) 178; bk. 4, L. ed. 214.

³ *Jacob*, 178.

¹ 12 East, 632, and in Ex. Ch. 4 Taunt. 488.

for a purchase is bound to allege truly, if he state at all, the motives which operate with him for treating, or for making the offer he in fact makes. A *seller* is unquestionably liable to an action of deceit if he fraudulently misrepresent the quality of the thing sold to be other than it is, in some particulars which *the buyer has not equal means with himself of knowing*, or if he do so in such manner as to *induce the buyer to forbear making the inquiries* which, for his own security and advantage he would otherwise have made. But is a *buyer* liable to an action of deceit for misrepresenting the seller's chance of sale, or the probability of his getting a better price for his commodity than the price which such proposed buyer offers? I am not aware of any case or recognized principle of law upon which such a * duty can be considered as incumbent upon a party [*410] bargaining for a purchase. It appears to be a false representation in a matter merely *gratis dictum*, by the bidder, in respect to which the bidder was under *no legal pledge or obligation to the seller* for the precise accuracy and correctness of his statement, and upon which, therefore, it was the seller's own indiscretion to rely, and for the consequences of which reliance, therefore, he can maintain no action."

When the case came before the Exchequer Chamber,² Puller, in argument, insisted that the false representation made by defendant was on a matter of *fact*, not of *opinion*, and that there was no case in which it had been held that an action would not lie under such circumstances; but the Court would hear no reply, and at once confirmed the judgment, Sir James Mansfield C. J. simply saying: "The question is whether the defendant is bound to disclose the highest price he chooses to give, or whether he be not at liberty to do that

² 4 Taunt. 488.

Fraudulent misrepresentation is a question for the jury.—Dodd v. McCraw, 8 Ark. 88; s. c. 46 Am. Dec. 301; Prescott v. Wright, 70 Mass. (4 Gray) 461, 464; Bidault v. Wales, 19 Mo. 36; s. c. 59 Am. Dec. 327; Briscoe v. Bronaugh, 1 Tex. 328; s. c. 46 Am. Dec. 108; Laidlaw v. Organ, 15

U. S. (2 Wheat.) 178; bk. 4, L. ed. 214. But it is a question of law where the facts are ascertained. Brady v. Barnes, 42 Conn. 522; Redfield v. Buck, 35 Conn. 338; Lavette v. Sage, 29 Conn. 589; Pettibone v. Stevens, 15 Conn. 19; s. c. 38 Am. Dec. 57; Upton v. Tribilcock, 13 Nat. Bank Reg. 181.

as a purchaser which every seller in this town does every day, who tells every falsehood he can to induce a buyer to purchase."

§ 542. In *Jones v. Franklin*,¹ *coram* Rolfe B. at Nisi Prius, the action was *trover*, and the circumstances were that the plaintiffs, assignees of a bankrupt, were owners of a policy for 999*l.*, on the life of one George Laing, and early in 1840 had endeavored through their attorney to sell it for 40*l.*, but could find no purchaser. Defendant knew this fact. On the 15th of August Laing became suddenly very ill, and he died on the 20th. On the 18th defendant employed one Cook to buy the policy for the defendant, and to give as much as sixty guineas for it. The vendor asked Cook when he applied to buy it what he thought it would be worth, and Cook said about sixty guineas. Cook and the defendant both knew that Laing was in imminent danger, but did not inform the vendor, who was ignorant of it, and sold the policy at that price, supposing Laing to be in [*411] good health. * Rolfe B. said, "there could be no doubt such conduct was grossly dishonorable. But he had no difficulty in going further than this, and telling the jury that if they believed the facts as stated on the part of the plaintiffs, the defendant's conduct amounted to legal fraud, and he could not set up any title to the policy so acquired."

§ 543. It does not seem possible to reconcile this case with *Vernon v. Keys*. In both cases the purchasers made a false representation. But in *Vernon v. Keys*, the falsehood was *volunteered*, and misrepresented a *fact*; whereas in *Jones v. Franklin*, the buyer's statement, through his agent, that the policy was worth about sixty guineas, was only made in answer to a question of the vendor as to his *opinion*, and according to Lord Ellenborough, the buyer was "under no legal duty or obligation to the seller for the precise accuracy of his statement," and the seller could maintain no action for "the consequences of his own indiscretion in relying on it."

¹ 2 Moo. & R. 348.

There was, perhaps, enough in the case to bring it within the principle of *equity* laid down by Lord Eldon in *Turner v. Harvey*,¹ but dishonorable and unfair as was the conduct of the buyer, it would be difficult to show, on authority, that it was in law such a fraud as vitiated the sale.

§ 544. In America it has been held, that if a purchaser make false and fraudulent representations as to his own solvency, and means of payment, and thereby induces the vendor to sell to him on credit, no right either of property or possession is acquired by the purchaser, and the vendor would be justified in retaking the property, provided he could do so without violence.¹

[And the Supreme Court of the United States has decided that a purchaser of goods, who, without making any fraudulent representations as to his solvency, conceals from the vendor his insolvent condition, and thereby induces him to sell the goods on credit, is guilty of such a fraud as entitles *the vendor to disaffirm the contract and [*412] recover the goods; if in the meantime no innocent person has acquired an interest in them.² It would seem, therefore, that in America, as in England, the contract is treated as voidable and not void. Some of the decisions, however, given in the States, proceed upon the principle that where the buyer does not intend to pay for the goods, the contract is absolutely void (except by estoppel as against the buyer, if the vendor chooses to affirm it), because it is not the intention of both parties to be bound by it.³ In both countries, however, the rights of innocent purchasers from a fraudulent vendee are protected, and it seems to be of no practical importance whether the protection is granted on the ground that the original contract of sale is valid until disaffirmed, or whether this result follows from the equitable

¹ Jac. 169.

¹ *Hodgedon v. Hubbard*, 18 Vermont R. 504; *Johnson v. Peck*, 1 Woodb. & M. C. C. 334; *Mason v. Crosby*, 1 Woodb. & M. C. C. 342.

² *Donaldson v. Farwell*, 93 U. S. (3 Otto) 681; bk. 23, L. ed. 993. See,

also, *Root v. French*, 13 Wend. (N. Y.) 570.

³ *Per Doe J.* in *Stewart v. Emerson*, 52 N. H. 301, at p. 318, where all the authorities, English and American, are discussed; and see the remarks of Cockburn C. J. in *Moyce v. Newington*, 4 Q. B. D. 35, *ante*, p. 405.

doctrine, that when one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud.]

Section III.—FRAUD ON THE BUYER.

§ 545. In every case where a buyer has been imposed on by the fraud of the vendor, he has a right to repudiate the contract, a right correlative with that of the vendor to disaffirm the sale when he has been defrauded. The buyer under such circumstances may refuse to accept the goods, if he discover the fraud before delivery, or return them, if the discovery be not made till after delivery; and if he has paid the price, he may recover it back on offering to return the goods, in the same state in which he received them.¹ And this

¹ *Clarke v. Dickson*, E. B. & E. 148, and 27 L. J. Q. B. 223; *Murray v. Mann*, 2 Ex. 538; *Street v. Blay*, 2 B. & Ad. 456.

American authorities.—*Pierce v. Wilson*, 34 Ala. 596; *Jemison v. Woodruff*, 34 Ala. 143; *Blen v. Bear River &c. Co.*, 20 Cal. 602; *Buchenau v. Horney*, 12 Ill. 336; *Shaw v. Barnhart*, 17 Ind. 183; *Gatling v. Newell*, 9 Ind. 572, 577; *Hoopes v. Strasburger*, 37 Md. 390, 391; *Farris v. Ware*, 60 Me. 482; *Perkins v. Bailey*, 99 Mass. 61, 62; *King v. Eagle Mills*, 92 Mass. (10 Allen) 551; *Manahan v. Noyes*, 52 N. H. 232; *Butler v. Northumberland*, 50 N. H. 39, 40; *Getchell v. Chase*, 37 N. H. 110; *Wheaton v. Baker*, 14 Barb. (N. Y.) 594; *Anthony v. Day*, 52 How. (N. Y.) Pr. 35; *Dows v. Griswold*, 4 Hun (N. Y.) 550; *Van Liew v. Johnson*, 4 Hun (N. Y.) 415; *Farrell v. Corbett*, 4 Hun (N. Y.) 128; *Kinney v. Kiernan*, 2 Lans. (N. Y.) 492; *Gates v. Bliss*, 43 Vt. 299; *Downer v. Smith*, 32 Vt. 1; *Poor v. Woodburn*, 25 Vt. 234. See, also, *Queen v. Saddler's Co.*, 10 H. L. Cas. 420, 421.

Vendee must rescind a contract in toto the same as the vendor. See *Miner v. Bradley*, 39 Mass. (22 Pick.)

457; *Preston v. Travelers' Ins. Co.*, 58 N. H. 76; *Voorhees v. Earl*, 2 Hill (N. Y.) 292; s. c. 38 Am. Dec. 588; *Burton v. Stewart*, 3 Wend. (N. Y.) 236; s. c. 20 Am. Dec. 692; *Vide ante*, Rescission of Contract. He cannot at the same time retain the property and recover damages. *Junkins v. Simpson*, 14 Me. 364; *Weeks v. Robie*, 42 N. H. 316. See *Fitz v. Bynum*, 55 Cal. 459; *Warren v. Tyler*, 81 Ill. 15; *Jennings v. Gage*, 13 Ill. 610; s. c. 56 Am. Dec. 476; *Cates v. Bales*, 78 Ind. 285; *Haase v. Mitchell*, 58 Ind. 213; *Heaton v. Knowlton*, 53 Ind. 357; *Cushing v. Wyman*, 38 Me. 589; *Cushman v. Marshall*, 21 Me. 122; *Seaver v. Dingley*, 4 Me. (4 Greenl.) 306; *Norton v. Young*, 3 Me. (3 Greenl.) 30; *Mullen v. Old Colony R. R. Co.*, 127 Mass. 86; s. c. 34 Am. Rep. 349; *Coolidge v. Brigham*, 42 Mass. (1 Metc.) 550; *Perley v. Balch*, 40 Mass. (23 Pick.) 286; s. c. 34 Am. Dec. 56; *Miner v. Bradley*, 39 Mass. (22 Pick.) 457; *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 307; s. c. 23 Am. Dec. 607; *Kimball v. Cunningham*, 4 Mass. 502; s. c. 3 Am. Dec. 230; *Wood v. Garland*, 58 N. H. 154; *Benson v. Tilton*, 58 N. H. 137;

ability to restore the thing purchased unchanged in
 * condition is indispensable to the exercise of the right [*413]
 to rescind, so that if the purchaser has innocently
 changed that condition while ignorant of the fraud he cannot
 rescind.²

Moody v. Drown, 58 N. H. 45; *Noyes v. Patrick*, 58 N. H. 618; *Spencer v. St Clair*, 57 N. H. 9; *Willoughby v. Moulton*, 47 N. H. 205; *Weeks v. Robie*, 42 N. H. 316; *Sumner v. Parker*, 36 N. H. 449; *Cook v. Gilman*, 34 N. H. 556; *Evans v. Gale*, 21 N. H. 240; s. c. 43 Am. Dec. 614; *Gould v. Cayuga Co. Bank*, 86 N. Y. 75; *Schiffer v. Dietz*, 83 N. Y. 300; *Fullager v. Reville*, 3 Hun (N. Y.) 600; *Pope v. Pictou Steamboat Co.*, 2 Old. (N. S.) 18; *Hunt v. Silk*, 5 East, 449.

Depreciation of property will not affect the right to rescind. See *Scott v. Perrin*, 4 Bibb (Ky.) 360; *Neblett v. Macfarland*, 92 U. S. (2 Otto) 101, 104; bk. 28, L. ed. 471; *Veazie v. Williams*, 49 U. S. (8 How.) 134, 158; bk. 12, L. ed. 1018; *Blake v. Mowatt*, 21 Beav. 613.

Election of vendee when once made with a full knowledge of all the facts and circumstances connected with the transaction will be binding upon him. *Kingsley v. Wallis*, 14 Me. 57; *Brinley v. Tibbets*, 7 Me. (7 Greenl.) 70; *Weeks v. Robie*, 42 N. H. 316, 320; *Drew v. Claggett*, 39 N. H. 431; *Brown v. Mahurin*, 39 N. H. 156; *Cook v. Gilman*, 34 N. H. 556; *Webb v. Stone*, 24 N. H. 288; *Allen v. Webb*, 24 N. H. 278; *Pierce v. Duncan*, 22 N. H. 18; *Jenkins v. Thompson*, 20 N. H. 457; *Fuller v. Little*, 7 N. H. 535; *Masson v. Bovit*, 1 Den. (N. Y.) 69; s. c. 43 Am. Dec. 651.

The purchaser may rescind for the breach of express warranty. *Bryant v. Isburg*, 79 Mass. (13 Gray) 607; s. c. 74 Am. Dec. 655. But the election to rescind must be made within a reasonable time. *Brantley v. Thomas*, 22 Tex. 270; s. c. 73 Am.

Dec. 264; *Christy v. Cummins*, 3 McL. C. C. 386; 2 Kent Com. 480; *Story on Contr.* p. 931, section 844a. In those cases where the goods are worthless no return need be made in order to rescind. *Jemison v. Woodruff*, 34 Ala. 143; *Merritt v. Robinson*, 35 Ark. 483; *Fitz v. Bynum*, 55 Cal. 459; *Morrison v. Lods*, 39 Cal. 381; *Smith v. Bittenham*, 98 Ill. 188; *Jennings v. Gage*, 13 Ill. 610; s. c. 56 Am. Dec. 476; *Haase v. Mitchell*, 58 Ind. 213; *Rose v. Hurley*, 39 Ind. 77; *Shaw v. Barnhart*, 17 Ind. 183; *Bacon v. Brown*, 4 Bibb (Ky.) 91; *Perley v. Balch*, 40 Mass. (23 Pick.) 283; s. c. 34 Am. Dec. 56; *First Nat. Bank of Barnesville v. Yocum*, 11 Neb. 328; *Spencer v. St Clair*, 57 N. H. 9; *Manahan v. Noyes*, 52 N. H. 232; *Sanborn v. Batchelder*, 51 N. H. 426, 434; *Butler v. Northumberland*, 50 N. H. 33; *Willoughby v. Moulton*, 47 N. H. 205; *Weeks v. Robie*, 42 N. H. 316, 322; *Getchell v. Chase*, 37 N. H. 106, 110; *Baker v. Lever*, 67 N. Y. 304; s. c. 23 Am. Rep. 117; *Dows v. Griswold*, 4 Hun (N. Y.) 550, 556; *Van Liew v. Johnson*, 4 Hun (N. Y.) 415; *Farrell v. Corbett*, 4 Hun (N. Y.) 128; *Brantley v. Thomas*, 22 Tex. 270; s. c. 73 Am. Dec. 264; *Wintz v. Morrison*, 17 Tex. 372; s. c. 67 Am. Dec. 658; *Gates v. Bliss*, 43 Vt. 209; *Downer v. Smith*, 32 Vt. 1, 7; *Pence v. Langdon*, 99 U. S. (9 Otto) 578; bk. 25, L. ed. 420.

² *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 145; cases, ante, at p. 370.

Fraud in the vendee entitles the purchaser to rescind. *Merritt v. Robinson*, 35 Ark. 483; *Bank of Woodland v. Hiatt*, 58 Cal. 234;

§ 546. But the contract is *only voidable, not void*, and if after discovery of the fraud he acquiesces in the sale by express words or by any unequivocal act, such as treating the property as his own, his election will be determined, and he cannot afterwards reject the property.¹ Mere delay also may have the same effect, if, while deliberating, the position of the vendor has been altered;² and the result will not be

Morrison v. Lods, 39 Cal. 381; *Cruess v. Fessler*, 39 Cal. 336; *Gifford v. Carvill*, 29 Cal. 589; *Warren v. Tyler*, 81 Ill. 15; *Hall v. Fullerton*, 69 Ill. 448; *Foult v. Eckert*, 61 Ill. 318; *Prentiss v. Russ*, 16 Me. 30; *Waters Patent Heater Co. v. Smith*, 120 Mass. 444; *Perkins v. Bailey*, 99 Mass. 61; *Coolidge v. Brigham*, 42 Mass. (1 Metc.) 547; *Kimball v. Cunningham*, 4 Mass. 502; s. c. 3 Am. Dec. 230; *First Nat. Bank v. Yocum*, 11 Neb. 328; *Baker v. Lever*, 67 N. Y. 304; *Croyle v. Moses*, 90 Pa. St. 250; *Lowry v. McLane*, 3 Grant (Pa.) 333; *Gates v. Bliss*, 43 Vt. 299; *Poor v. Woodburn*, 25 Vt. 234; *Pence v. Langdon*, 99 U. S. (9 Otto) 578; bk. 25, L. ed. 420; *Cushwa v. Forrest*, 4 Cr. C. C. 37; *Doggett v. Emerson*, 3 Story C. C. 700; *Cheongwo v. Jones*, 3 Wash. C. C. 359.

But instead of rescinding the contract the vendee, after discovery of the fraud, may recover any damage for the fraud, and he may recoup damages in an action by the vendor for the purchase price. An affirmation of the contract simply cuts off the right to rescind. *Lilley v. Randall*, 3 Colo. 298; *Kellogg v. Denslow*, 14 Conn. 411; *Foult v. Eckert*, 61 Ill. 318; *Peck v. Brewer*, 48 Ill. 55; *Wright v. Lattin*, 38 Ill. 293; *Lunn v. Gage*, 37 Ill. 19; *Bates v. Courtwright*, 36 Ill. 518; *Sanger v. Fincher*, 27 Ill. 347; *Schuchmann v. Knoebel*, 27 Ill. 175; *Brigham v. Hawley*, 17 Ill. 38; *Stow v. Yarwood*, 14 Ill. 424; *Hoggins v. Becraft*, 1 Dana (Ky.) 30; *Herrin v. Libbey*, 36 Me.

357; *Manahan v. Noyes*, 52 N. H. 232; *Sanborn v. Batchelder*, 51 N. H. 426; *Butler v. Northumberland*, 50 N. H. 39; *Miller v. Barber*, 66 N. Y. 558; *Bordwell v. Collie*, 45 N. Y. 494; *Johnson v. Luxton*, 41 N. Y. Super. Ct. (9 J. & S.) 481; *Ely v. Mumford*, 47 Barb. (N. Y.) 629; *The Ilion Bank v. Carver*, 31 Barb. (N. Y.) 235; *Newbery v. Garland*, 31 Barb. (N. Y.) 128; *Van Epps v. Harrison*, 5 Hill (N. Y.) 68; *Allaire v. Whitney*, 1 Hill (N. Y.) 485; s. c. 4 Den. (N. Y.) 555; *Krumm v. Beach*, 25 Hun (N. Y.) 293; *Ranney v. Warren*, 17 Hun (N. Y.) 111; *Lexow v. Julian*, 14 Hun (N. Y.) 152; *Boorman v. Jenkins*, 12 Wend. (N. Y.) 566; s. c. 27 Am. Dec. 158; *Waring v. Mason*, 18 Wend. (N. Y.) 426; *Weimer v. Clement*, 37 Pa. St. 147; s. c. 78 Am. Dec. 411; 2 Kent Com. (5th ed.) 480, n. B.

Partial restoration may be accepted by the vendee. *Hammond v. Pennock*, 61 N. Y. 145. See *Masson v. Bovet*, 1 Den. (N. Y.) 69; s. c. 43 Am. Dec. 651.

¹ *Acquiescence after discovery of the fraud* waives the right to rescind. *Thompson v. Lee*, 31 Ala. 292, 303; *Evans v. Montgomery*, 50 Iowa, 325, 337; *Kimball v. Cunningham*, 4 Mass. 502; s. c. 3 Am. Dec. 230; *Weeks v. Robie*, 42 N. H. 316, 320; *Leaming v. Wise*, 73 Pa. St. 173; *Downer v. Smith*, 32 Vt. 1; s. c. 76 Am. Dec. 138; *Grymes v. Sanders*, 93 U. S. (3 Otto) 62; bk. 23, L. ed. 798.

² *Clough v. London & North Western Railway Co.*, ante, pp. 400-1. See, also, *Davis v. Betz*, 66 Ala. 206;

affected by the buyer's subsequent discovery of a new incident in the fraud, for this would not confer a new right to rescind, but would merely confirm the previous knowledge of the fraud.³

§ 547. These principles are well illustrated in the case of *Campbell v. Fleming*.¹ The plaintiff, deceived by false representations of the defendant, purchased shares in a mining company. After the purchase he discovered the fraud, and that the whole scheme of the company was a deception.

Collins v. Townsend, 58 Cal. 608; *Hall v. Fullerton*, 69 Ill. 448; *St. John v. Hendrickson*, 81 Ind. 350; *Rose v. Hurley*, 39 Ind. 77; *Gatling v. Newell*, 9 Ind. 572, 578; *Willoughby v. Moulton*, 47 N. H. 205; *Weeks v. Robie*, 42 N. H. 316; *Hammond v. Pennock*, 61 N. Y. 145; *Ross v. Titterton*, 6 Hun (N. Y.) 280; *Parmlee v. Adolph*, 28 Ohio St. 10; *Boughton v. Standish*, 48 Vt. 594; *Matteson v. Holt*, 45 Vt. 336; *Whitcomb v. Denio*, 52 Vt. 382; *Pence v. Langdon*, 99 U. S. (9 Otto) 578; bk. 25, L. ed. 420; *Smith's Case*, L. R. 2 Ch. App. 604; *Heymann v. European Cent. R. Co.*, L. R. 7 Eq. 154; *Central R. Co. v. Kisch*, L. R. 2 H. L. 99.

³ *Right to avoid waived by delay.*—The right to rescind must be exercised on discovering the fraud entitling to a rescission or the right to rescind will be waived. *Collins v. Townsend*, 58 Cal. 608, 614; *Gifford v. Carvill*, 29 Cal. 592; *Blen v. Bear River &c. Co.*, 20 Cal. 602; *Hall v. Fullerton*, 69 Ill. 448; *Evans v. Montgomery*, 50 Iowa, 325, 337; *Rawson v. Harger*, 48 Iowa, 269, 274; *Herrin v. Libbey*, 36 Me. 357; *Willoughby v. Moulton*, 47 N. H. 205; *Burton v. Stewart*, 3 Wend. N. Y. 236; *Parmlee v. Adolph*, 28 Ohio St. 10, 17. However, some cases hold with the text that simple delay will not deprive the defrauded buyer of the right to rescind in those cases where the seller's position has not been altered in the meantime. *Dayton v. Monroe*, 47 Mich. 193;

Whitcomb v. Denio, 52 Vt. 382, 390. The right to rescind is seasonably exercised within a reasonable time after the discovery of the fraud. See *Lane v. Latimer*, 41 Ga. 171; *Michigan Cent. R. R. Co. v. Dunham*, 30 Mich. 128; *Baker v. Lever*, 67 N. Y. 304; *Powell v. Woodworth*, 46 Vt. 378; *Gates v. Bliss*, 43 Vt. 299; *Esty v. Read*, 29 Vt. 278. What is a reasonable time is a question for the jury. *Baker v. Lever*, 67 N. Y. 304; *Rothschild v. Rowe*, 44 Vt. 389; *Esty v. Read*, 29 Vt. 278; *Belun v. Western Union Telegraph Co.*, 25 Int. Rev. Rec. 179; s. c. 7 Rep. 710, 720; 4 Cinc. L. Bull. 334; *Rodney v. Royal*, 8 Rep. 27. But where the facts are undisputed whether a contract is rescinded within a reasonable time is a matter of law. *Barbour v. White*, 37 Ill. 164; *Greene v. Dingley*, 24 Me. 131; *Hill v. Hobart*, 16 Me. 164; *Kingsley v. Wallis*, 14 Me. 57; *Williams v. Powell*, 101 Mass. 467; s. c. 3 Am. Rep. 396; *Pratt v. Farrar*, 92 Mass. (10 Allen) 519; *Spoor v. Spooner*, 42 Mass. (12 Metc.) 281; *Holbrook v. Burt*, 39 Mass. (22 Pick.) 546, 555; *Gilmore v. Wilbur*, 29 Mass. (12 Pick.) 120; s. c. 22 Am. Dec. 410; *Hedges v. Hudson R. R. Co.*, 49 N. Y. 223; *Newkirk v. New York & H. R. R. Co.*, 38 N. Y. 158; *Healy v. Utly*, 1 Cow. (N. Y.) 345; *Morgan v. McKee*, 77 Pa. St. 228; *Leaming v. Wise*, 73 Pa. St. 173.

¹ 1 A. & E. 40.

The action was brought to recover the purchase money that he had paid. But it appeared that subsequently to the discovery of the fraud, the plaintiff had treated the shares as his own, by consolidating them with other property in the formation of a new company, in which he sold shares, and realized a considerable sum. The plaintiff then endeavored to get rid of the effect of the confirmation of the contract, resulting from his dealing with the shares as his own, by showing that at a still later period he had discovered another fact, namely, that only 5000*l.* had been paid for the purchase of property by the mining company, although it was falsely represented to the plaintiff when he took the shares that the outlay had been 35,000*l.* The plaintiff was nonsuited by Lord Denman, and on the motion for new trial all the judges held the nonsuit right. Littledale J. said:

"After the plaintiff learned that an imposition had [*414] been practised on *him, he ought to have made his stand. Instead of doing so, he goes on dealing with the shares, and in fact disposes of some of them. Supposing him not to have had at that time so full a knowledge of the fraud as he afterwards obtained, *he had given up his right of objection by dealing with the property after he had once discovered that he had been imposed upon.*" Parke J. said: "After the plaintiff, knowing of the fraud, had elected to treat the transaction as a contract, he had lost his right of rescinding it; *and the fraud could do no more than entitle him to rescind.*" Patteson J. concurred, and said: "Long afterwards he discovers a new incident in the fraud. This can only be considered as strengthening the evidence of the original fraud; *and it cannot revive the right of repudiation which has been once waived.*" Lord Denman C. J. said: "There is no authority for saying that a party must know *all the incidents of a fraud before he deprives himself of the right of rescinding.*"²

[The very recent case of *Redgrave v. Hurd*³ before the Court of Appeal decides two important points with reference

² See *ante*, p. 400, as to election, and the case of *Clough v. London and North Western Railway Co., L.* 7 Ex. 26, there cited. See *Pierce v. Wilson*, 34 Ala. 596, 609.

³ 20 Ch. D. 1, C. A. (reversing the

to the buyer's right to have a contract rescinded on the ground of fraud —

1. When the seller has made a false representation which from its nature might induce the buyer to enter into the contract on the faith of it, it will be inferred that the buyer was induced thereby to enter into the contract, and it does not rest with him to show that he in fact relied upon the representation.⁴

In order to displace this inference the seller must prove either that the buyer had knowledge of facts which showed the representation to be untrue, or that he expressly stated in terms or showed by his conduct that he did not rely upon the representation but acted upon his own judgment.

2. Where the buyer relies on the seller's representation, * he is not deprived of his right to relief be- [*415] cause he had the means of discovering that the representation was false.^{5]}

§ 548. The rules of law defining the elements which are essential to constitute such fraud as will enable a purchaser to avoid a sale were long in doubt, and there was specially a marked conflict of opinion between the Court of Queen's Bench and the Exchequer, until the decisions of the Exchequer Chamber in *Evans v. Collins*,¹ in 1844, and *Ormrod v. Huth*,² in 1845, established the true principle to be that a *representation, false in fact*, gives no right of action if *innocently made* by a party who believes the truth of what he asserts; and that in order to constitute fraud, there must be a false representation *knowingly made, i.e., a concurrence of fraudulent intent and false representation. And a false representation is knowingly made, when a party for a fraudulent*

decision of Fry J.), where the opinions of Lords Cottenham and Brougham and Earl Devon, in *Attwood v. Small*, 6 Cl. & F. 232, relied upon in the court below, are considered and explained by Jessel M. R. at pp. 14-17.

⁴ *Young v. Hall*, 4 Ga. 95; *Holbrook v. Burt*, 39 Mass. (22 Pick.) 546, 552; *Fishback v. Miller*, 15 Nev. 428; *Shaw v. Stine*, 8 Bosw. (N. Y.)

157; *Addington v. Allen*, 11 Wend. (N. Y.) 381; *James v. Hodsden*, 47 Vt. 137; *Cabot v. Christie*, 42 Vt. 121; s. c. 1 Am. Rep. 313.

⁵ *Bank of Woodland v. Haitt*, 58 Cal. 244; *Jackson v. Collins*, 39 Mich. 557, 561; *Baker v. Lever*, 67 N. Y. 304; s. c. 23 Am. Rep. 117; *Kendall v. Wilson*, 41 Vt. 567, 571.

¹ 5 Q. B. 820.

² 14 M. & W. 650.

*purpose states what he does not believe to be true, even though he may have no knowledge on the subject.*³ These decisions bring back the law almost exactly to the point at which it was left by the King's Bench in the great leading cases of *Pasley v. Freeman*,⁴ and *Haycraft v. Creasy*,⁵ decided in 1789 and 1801.⁶

³ *Statement made without knowledge* where untrue amounts to a fraudulent representation. *Sledge v. Scott*, 56 Ala. 202; *DaLee v. Blackburn*, 11 Kans. 190; *King v. Eagle Mills*, 92 Mass. (10 Allen) 551; *Weimer v. Clement*, 37 Pa. St. 147; s. c. 78 Am. Dec. 411; *McFarland v. Newman*, 9 Watts (Pa.) 55; s. c. 34 Am. Dec. 497. See, also, *Cooper v. Lovering*, 106 Mass. 77; *Brown v. Castles*, 65 Mass. (11 Cush.) 348; *Stone v. Denny*, 45 Mass. (4 Metc.) 151; *Small v. Atwood*, *Younge*, 407, 461. However, it is held that the seller is not guilty of fraud in misrepresenting the condition of goods sold unless he knew that the representations were false. *Bryant v. Crosby*, 36 Me. 562; s. c. 58 Am. Dec. 767; *Staines v. Shore*, 16 Pa. St. 200; s. c. 55 Am. Dec. 492. But see *Smith v. Beatty*, 2 Ired. (N. C.) Eq. 456; s. c. 40 Am. Dec. 435; *Ingram v. Morgan*, 4 Humph. (Tenn.) 66; s. c. 40 Am. Dec. 626; *Mitchell v. Zimmerman*, 4 Tex. 75, because there is no deceit without *scienter*. *Kingsbury v. Taylor*, 29 Me. 509; s. c. 50 Am. Dec. 607; *Pearson v. Howe*, 83 Mass. (1 Allen) 208; *Webster v. Larned*, 47 Mass. (6 Metc.) 527; *Stone v. Denny*, 45 Mass. (4 Metc.) 158; *Page v. Bent*, 43 Mass. (2 Metc.) 374; *Tryon v. Whitmarsh*, 42 Mass. (1 Metc.) 1; s. c. 35 Am. Dec. 389.

Silence in case of latent and patent defects.— Mere silence of the vendor who has knowledge of a latent defect in a chattel sold, constitutes a deceit for which he is liable in damages; proof of the *scienter* and a *suppressio veri* is sufficient. *Case v. Edney*, 4 Ired. (N. C.) L. 93; *Cobb v. Fogalman*, 1 Ired. (N. C.) L. 440; *Brown*

v. Gray, 6 Jones (N. C.) L. 103; s. c. 72 Am. Dec. 563; *Wintz v. Morrison*, 17 Tex. 372; s. c. 67 Am. Dec. 658. As to when *suppressio veri* constitutes fraud, see *Beard v. Campbell*, 2 A. K. Marsh. (Ky.) 125; s. c. 12 Am. Dec. 362; *Mills v. Lee*, 6 T. B. Mon. (Ky.) 91; s. c. 17 Am. Dec. 118; *Bean v. Herrick*, 12 Me. 262; s. c. 28 Am. Dec. 176; *Durell v. Haley*, 1 Paige Ch. (N. Y.) 492; s. c. 19 Am. Dec. 444; *Mactier Adm'r v. Frith*, 6 Wend. (N. Y.) 103; s. c. 21 Am. Dec. 262; *McFarland v. Febiger*, 7 Ohio, pt. 1, 194; s. c. 28 Am. Dec. 632; *Robinson v. Justice*, 2 Pen. & W. (Pa.) 19; s. c. 21 Am. Dec. 407; *Haynie v. Hall*, 5 Humph. (Tenn.) 290; s. c. 42 Am. Dec. 427. But the mere silence of the vendor who has knowledge of a patent defect in the chattel sold discoverable by the exercise of ordinary diligence does not make him liable in damages as for deceit. *Brown v. Gray*, 6 Jones (N. C.) L. 103; s. c. 72 Am. Dec. 563; *Frenzel v. Miller*, 37 Ind. 1; s. c. 10 Am. Rep. 62; because it is a moral and not a legal fraud. *Howell v. Biddlecom*, 62 Barb. (N. Y.) 131; there must be a misrepresentation or concealment, and proof of the *scienter* and a *suggestio falsi*. *Brown v. Gray*, 6 Jones (N. C.) L. 103; s. c. 72 Am. Dec. 563. But the seller is liable for the failure to disclose latent defects unknown to the buyer. *Hoe v. Sanborn*, 21 N. Y. 552; s. c. 78 Am. Dec. 163.

⁴ 3 T. R. 51; 2 Sm. L. C. 66, 8th Ed.

⁵ 2 East, 92.

⁶ *Innocent misrepresentations are not fraudulent and will not avoid the sale.*

[The above rules must be taken subject to the qualification hereinafter noticed (*post*, p. 423) with regard to reckless statements.]

The effect of innocent misrepresentation as causing Mistake or Failure of Consideration has been treated *ante*, p. 376 *et seq.*

§ 549. In the former of these cases it was held, that a false affirmation made by the defendant, with intent to defraud the plaintiff, whereby the plaintiff receives damage, is the ground of an action upon the case in the nature of deceit; and that such action will lie, though the defendant may not benefit by the deceit, nor collude with the person who is to benefit by it. *Pasley v. Freeman* was an action brought against a party for damages, for falsely representing a third person to be one *whom the plaintiff could [*416] safely trust, the *defendant well knowing* that this was not true.

In the latter case, *Haycraft v. Creasy*, it was held, that an action of deceit would *not* lie upon similar false representations, though the party affirmed that he spoke of his own knowledge, if *the representations were made bonâ fide with a belief in their truth.*

After a series of intervening cases, that of *Foster v. Charles*¹ came twice before the Common Pleas in 1830 and 1831, and was deliberately approved and followed by the

Righter v. Roller, 31 Ark. 170, 174; *Sanford v. Cloud*, 17 Fla. 557, 572; *Kimbell v. Moreland*, 55 Ga. 164; *Tone v. Wilson*, 81 Ill. 529, 533; *Merwin v. Arbuckle*, 81 Ill. 501; *Bird v. Forceman*, 62 Ill. 212; *Wheeler v. Randall*, 48 Ill. 182; *Clement v. Boone*, 5 Ill. App. 109; *Gregory v. Schoenell*, 55 Ind. 101; *Rawson v. Harger*, 48 Iowa, 271; *Lamm v. Port Deposit Homestead Assoc.*, 49 Md. 233, 240; s. c. 33 Am. Rep. 246; *King v. Eagle Mills*, 92 Mass. (10 Allen) 548; *Merriam v. Pine City Lumber Co.*, 23 Minn. 314; *Klein v. Rector*, 57 Miss. 538; *Sims v. Eiland*, 57 Miss. 83, 607; *Merchants' Bank v.*

Sells, 3 Mo. App. 85; *Pettigrew v. Chellis*, 41 N. H. 95, 99; *Page v. Parker*, 40 N. H. 47; *Hanson v. Edgerly*, 29 N. H. 343; *Allen v. Wanamaker*, 81 N. J. L. (2 Vr.) 370; *Searing v. Lum*, 5 N. J. L. (2 South.) 683; *Nelson v. Luling*, 46 How. (N. Y.) Pr. 355; *Parmlee v. Adolph*, 28 Ohio St. 10, 20; *Taylor v. Leith*, 26 Ohio St. 428; *Bigler v. Flickinger*, 55 Pa. St. 279, 283; *Mason v. Chapell*, 15 Gratt. (Va.) 572; *Marnlock v. Fairbanks*, 46 Wis. 415; *Lord v. Goddard*, 54 U. S. (13 How.) 198, 211; bk. 14, L. ed. 111.

¹ 6 Bing. 396, and 7 Bing. 105

Queen's Bench in *Polhill v. Walter*,² in 1832. It was held in these cases unnecessary to prove "a corrupt motive of gain to the defendant, or a wicked motive of injury to the plaintiff. It is enough if a representation is made which the party making it *knows to be untrue*, and which is intended by him, or which, from the mode in which it is made, is *calculated to induce another to act on the faith of it* in such a way as that he may incur damage, and that damage is actually incurred. A wilful falsehood of such a nature is, in the legal sense of the word, a *fraud*."

[And upon the question of motive the judgment in *Polhill v. Walter* is fully confirmed by the observations of Lord Cairns in *Peek v. Gurney*,³ who says, "In a *civil* proceeding of this kind all that your lordships have to examine is the question, Was there or was there not misrepresentation in point of fact? and if there was, *however innocent the motive may have been*, your lordships will be obliged to arrive at the consequences which properly would result from what was done."]

§ 550. While the authorities stood in this condition, the cases of *Cornfoot v. Fowke*,¹ and *Fuller v. Wilson*,² were decided, the former in the Exchequer, in 1840, and the latter in the Queen's Bench, in 1842, the judges in the latter case expressly declining to follow the ruling in the former, [*417] and *adopting in preference the dissenting opinion of Lord Abinger.

Cornfoot v. Fowke,³ was a case in which the defendant refused to comply with an agreement to take a furnished house, on the ground that he had been defrauded by the plaintiff and others in collusion with him. The house had been represented to the defendant by plaintiff's agent as

² 3 B. & Ad. 122.

³ L. R. 6 H. L. at p. 409, and see *Leddell v. McDougall*, 29 W. R. 403, C. A.

¹ 6 M. & W. 358. See *Coddington v. Goddard*, 82 Mass. (16 Gray) 436; *Bank of United States v. Davis*, 2 Hill (N. Y.) 451, 461, 462; *Fitzsimmons v. Joslin*, 21 Vt. 129, 141; s. c.

53 Am. Dec. 48; *Ruggles v. General Int. Ins. Co.*, 4 Mason C. C. 74; s. c. 25 U. S. (12 Wheat.) 408; bk. 6, L. ed. 674; *Carpenter v. American Ins. Co.*, 1 Story C. C. 57; *Shirley v. Wilkinson*, Doug. 306; *Willes v. Glover*, 4 Bos. & Pul. 14.

² 3 Q. B. 58.

³ 6 M. & W. 358.

being entirely unobjectionable, whereas the adjoining house was a brothel and a nuisance, which was compelling people in the neighborhood to leave their houses. This fact was *known to the plaintiff*, but was *not known to his agent*, who made the representation, and the *plaintiff did not know* that the representation had been made. All the cases, from the leading one of *Pasley v. Freeman*,⁴ were cited in argument, and the majority of the Court, Rolfe, Anderson, and Parke, BB. held the defence unavailing, while Lord Abinger C. B. said that the opposite conclusion was so plain as not to admit a doubt in his mind, but for the dissent of his brethren.

Rolfe B. held the question to be one as to the power of an agent "to affect his principal by a representation *collateral to the contract*. To do this, it is essential . . . to bring home fraud to the principal, and . . . all the facts are consistent with the hypothesis that the plaintiff innocently gave no directions whatever on the subject, supposing that the intended tenant would make the necessary inquiries for himself."

Alderson B. said: "Here the representation, though false, was believed by the agent to be true. He, therefore, if the case stopped here, has been guilty of no fraud. . . . It is said that the knowledge on the part of the principal is sufficient to establish the fraud. If, indeed, the principal had instructed his agent to make the false statement, this would be so, although the agent would be innocent of any deceit; but this fact also fails. . . . I think it impossible to sustain a charge of fraud when neither principal nor agent has committed any, — the principal, because, though he knew the fact, he was not cognizant of the misrepresentation being *made, nor even directed the agent to [*418] make it; and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer *bonâ fide*."

Parke B. pointed out that the representation was no part of the contract, which was in writing, and, therefore, it could not affect the rights of the parties, except on the ground

⁴ 3 T. R. 51.

that it was fraudulent. On the simple facts, each person was innocent, because the plaintiff made no false representation himself, and although his agent did, the agent did it innocently, not knowing it to be false; and the proposition seemed untenable that if each was innocent, the act of either or both could be a fraud. It was conceded that an innocent principal would be bound if his agent committed a fraud, but in the case presented, the agent acted without fraudulent intent. It was also conceded that "if the plaintiff not merely knew of the nuisance, but purposely employed an ignorant agent, suspecting that a question would be asked of him, and at the same time suspecting or believing that it would by reason of such ignorance be answered in the negative, the plaintiff would unquestionably be guilty of fraud."⁵ His Lordship deemed it immaterial whether the making of such representations as were made by the agent was within the scope of his authority or not, as they could not affect the contract unless *fraudulent*. Lord Abinger C. B. gave an elaborate dissenting opinion, in which he held "that it is not correct to suppose that the legal definition of fraud and covin necessarily includes any degree of moral turpitude; . . . the warranty of a fact which does not exist, or the representation of a material fact contrary to the truth are both said in the language of the law to be fraudulent, although the party making them suppose them to be correct;" that there was not a total absence of moral turpitude in the agent, even upon the presumption that he was wholly ignorant of the matter: that "nothing can be more plain than that the principal, though not bound by the representation of his agent, cannot take advantage of a [*419] contract made under the *false representation of an agent, whether that agent was authorized by him or not to make such representation;" that it did not follow because the plaintiff was not bound by the representation of the agent, even if made without authority, that "he is therefore entitled to bind another man to a contract obtained by the false representation of an agent. *It is one thing to say*

⁵ See *Ludgater v. Love*, 44 L. T. N. S. 694, C. A. *post*, p. 428.

that he may avoid a contract if his agent without his authority has inserted a warranty in the contract, and *another to say that he may enforce a contract obtained by means of a false representation made by his agent*, because the agent had no authority.”⁶ (See observations in this case, *post*, p. 427.)

§ 551. In *Fuller v. Wilson*,¹ which was an action on the case for a false representation, the Queen’s Bench, through Lord Denman C. J. declined to take any ground other than the broad proposition of Lord Abinger, which they adopted, “that whether there was a moral fraud or not, if *the purchaser was actually deceived in his bargain, the law will relieve him from it*. We think the principal and his agent are for this purpose completely identified, and that the question is not what was passing in the mind of either, but

⁶ See *Putnam v. Sullivan*, 4 Mass. 45; s. c. 3 Am. Dec. 206; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Sanford v. Handy*, 23 Wend. (N. Y.) 260; *Fitzsimmons v. Joslin*, 21 Vt. 129, 141; s. c. 53 Am. Dec. 48; *Atwood v. Small*, 6 Cl. & Fin. 414; *Bartlett v. Salmon*, 6 De G. M. & G. 33, 39; *Hern v. Nichols*, 1 Salk. 289.

Misrepresentation by agent is a misrepresentation of the principal where the latter adopts the former’s acts, although such misrepresentation was made without his instruction, or knowledge, or assent. *Reed v. Peterson*, 91 Ill. 288; *Durant v. Rogers*, 87 Ill. 508; *Madison & I. R. R. Co. v. Norwich Savings Co.*, 24 Ind. 457; *Hornish v. Peck*, 53 Iowa, 157; *Gokey v. Knapp*, 44 Iowa, 32; *Lamm v. The Port Deposit Homestead Assoc.*, 49 Md. 233; s. c. 33 Am. Rep. 246; *Jewett v. Carter*, 132 Mass. 335; *Kibbe v. Hamilton Ins. Co.*, 77 Mass. (11 Gray) 163; *Eberts v. Selover*, 44 Mich. 519; s. c. 38 Am. Rep. 278; *Lawrence v. Hand*, 23 Miss. 103; *Bowers v. Johnson*, 18 Miss. (10 Smed. & M.) 169; *American Ins. Co. v. Kuhlman*, 6 Mo. App. 522; *Concord Bank v. Gregg*, 14 N. H. 331; *Fishkill Sav. Ins. v. Fishkill Bank*,

80 N. Y. 162; s. c. 36 Am. Rep. 595; *Indianapolis C. & P. R. Co. v. Tyng*, 63 N. Y. 653; *Allerton v. Allerton*, 50 N. Y. 670; *Westfield Bank v. Cornen*, 37 N. Y. 320, 322; *Elwell v. Chamberlin*, 31 N. Y. 611; *Griswold v. Haven*, 25 N. Y. 595; *Bennett v. Judson*, 21 N. Y. 238; *Farmers’ & Mechanics’ Bank v. Butchers’ & Drovers’ Bank*, 14 N. Y. 623; *Graves v. Spire*, 58 Barb. (N. Y.) 349; *Chester v. Dickerson*, 52 Barb. (N. Y.) 349; *Sharp v. New York*, 40 Barb. (N. Y.) 257; *North River Bank v. Aymar*, 3 Hill (N. Y.) 262; *Craig v. Ward*, 3 Keyes (N. Y.) 387; *Mundorff v. Wickersham*, 63 Pa. St. 87; s. c. 3 Am. Dec. 531; *Tagg v. Tennessee Nat. Bank*, 9 Heisk. (Tenn.) 479; *Abell v. Howe*, 43 Vt. 403; *Fitzsimmons v. Joslin*, 21 Vt. 129; s. c. 53 Am. Dec. 48; *DeVoss v. Richmond*, 18 Gratt. (Va.) 338; *Mihills Manuf. Co. v. Camp*, 49 Wis. 130; *Veazie v. Williams*, 49 U. S. (8 How.) 134; bk. 12, L. ed. 1018; *Doggett v. Emerson*, 3 Story C. C. 700; *Ferson v. Sanger*, 1 Woodb. & M. C. C. 138; *Warner v. Daniels*, 1 Woodb. & M. C. C. 90; *Brett v. Clowser*, 5 C. P. Div. 376.

¹ 3 Q. B. 58.

*whether the purchaser was in fact deceived by them or either of them."*²

The conflict of opinion cannot be more plainly stated. The Queen's Bench thought the sole test was whether the *purchaser was deceived by an untrue statement into making the bargain*. The Court of Exchequer thought it further necessary that the party making the untrue statement *should know it to be untrue*.

Fuller v. Wilson was reversed in error,³ solely on the ground that the facts of the case did not show any misrepresentation on the part of the vendor, but only the purchaser's own misapprehension; and Tindal C. J. in delivering the opinion, stated that the Court did "not enter into the question discussed in Cornfoot v. Fowke."

§ 552. In Moens v. Heyworth,¹ in 1842, the question again came before the Exchequer of Pleas (the case of [*420] Fuller v. * Wilson not being yet reported), and Lord Abinger renewed the expression of his dissent from Parke B., and Alderson B., repeating that "the fraud which vitiates a contract, . . . does not in all cases necessarily imply moral turpitude." His Lordship instanced the sale of a public-house, and an untrue statement by the seller that the receipts of the house were larger than was the fact, but the untrue statement might be made without dishonest intent, as if proper books had not been kept. In such case his Lordship insisted that the purchaser might maintain an action on the false representation, even though the vendor did not know that it was false when made. The other judges held the contrary, Parke B. saying distinctly, that in such cases "it is essential that there should be moral fraud."

§ 553. In the next year, 1843, Taylor v. Ashton,¹ came before the same Court, and the judgment of the Queen's Bench in Fuller v. Wilson was relied on by the plaintiff, but Parke B. said when it was cited: "I adhere to the doctrine

² A fraudulent representation made by a person acting not only as agent but as part-owner will be binding upon other part-owners. White v. Sawyer, 82 Mass. (16 Gray) 586,

589; Cook v. Castner, 62 Mass. (9 Cush.) 266.

³ Wilson v. Fuller, 3 Q. B. 1009.

¹ 10 M. & W. 147.

¹ 11 M. & W. 401.

that an action for deceit will not lie without proof of moral fraud, and Lord Denman seems to admit that to be so. If the party *bonâ fide* believes the representation he made to be true, though he does not *know* it, it is not actionable." The learned Baron afterwards delivered the judgment of the Court, *holding* that "it was not necessary, in order to constitute fraud, to show that the defendants *knew* the fact to be untrue: it was enough that the fact was untrue *if they communicated that fact for a deceitful purpose*; . . . if they stated a fact which was untrue for a fraudulent purpose, they at the same time *not believing* that fact to be true, in that case it would be both a legal and moral fraud."²

§ 554. In 1843, the Queen's Bench had before them the case of *Evans v. Collins*,¹ which was an action by a sheriff to recover damages against an attorney for falsely representing

² *Howard v. Gould*, 28 Vt. 523, 526; s. c. 67 Am. Dec. 728; *Evans v. Edmonds*, 13 C. B. 777, 786; *Polhill v. Walter*, 3 Barn. & Ad. 114; *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. Cas. 64; *Taylor v. Ashton*, 11 M. & W. 401.

Representations made recklessly, the party not knowing them to be true and made for the purpose of inducing the other party to purchase, are fraudulent and questionable. *Einstein v. Marshall*, 58 Ala. 153; s. c. 29 Am. Rep. 729; *Sledge v. Scott*, 56 Ala. 202; *Blackman v. Johnson*, 35 Ala. 252; *Monroe v. Pritchett*, 16 Ala. 785; s. c. 50 Am. Dec. 203; *Mahone v. Reeves*, 11 Ala. 345; *Juzan v. Toulmin*, 9 Ala. 662, 684; s. c. 44 Am. Dec. 448; *Williams v. Cannon*, 9 Ala. 348; *Camp v. Camp*, 2 Ala. 632; s. c. 36 Am. Dec. 423; *Barnett v. Stanton*, 2 Ala. 181; *Young v. Harris*, Admr. 2 Ala. 108; *Ricks v. Dillahunty*, 8 Port. (Ala.) 133; *Smith v. Newton*, 59 Ga. 113; *Allen v. Hart*, 72 Ill. 104; *Frenzel v. Miller*, 37 Ind. 1; s. c. 10 Am. Rep. 62; *McKown v. Furgason*, 47 Iowa, 636; *Foard v. McComb*, 12 Bush

(Ky.) 723; *Litchfield v. Hutchinson*, 117 Mass. 498; *Beach v. Bemis*, 107 Mass. 498; *Cooper v. Lovering*, 106 Mass. 77; *Fisher v. Mellen*, 103 Mass. 503; *Brown v. Castles*, 65 Mass. (11 Cush.) 348; *Stone v. Denny*, 45 Mass. (4 Metc.) 151; *Beebe v. Knapp*, 28 Mich. 53; *Sims v. Eiland*, 57 Miss. 607; *Estell v. Myers*, 54 Miss. 174; *Dulaney v. Rogers*, 64 Mo. 201; *Dunn v. Oldham*, 63 Mo. 181; *Hammond v. Pennock*, 61 N. Y. 145, 151; *Meyer v. Amidon*, 45 N. Y. 169, 175; *Marsh v. Falkner*, 40 N. Y. 569; *Meyer v. Amidon*, 23 Hun (N. Y.) 553; *Parmlee v. Adolph*, 28 Ohio St. 10, 21; *Bower v. Fenn*, 90 Pa. St. 359; s. c. 35 Am. Rep. 662; *Cabot v. Christie*, 42 Vt. 121; s. c. 1 Am. Rep. 313; *Cotzhausen v. Simon*, 47 Wis. 103; *Adamson v. Jarvis*, 4 Bing. 66; *Small v. Attwood*, Young, 407, 461.

Where representations literally true made for the purpose of deceiving, the fact of their truthfulness affords no excuse where the other party was deceived. *Denny v. Gilman*, 26 Me. 149.

¹ 5 Q. B. 804.

a certain person to be the person against whom a *ca. sa.* had been sued out by the attorney, so that the sheriff had been induced to take the wrong person into custody, and had thereby incurred damage. The jury found that the [*421] defendant had probable *reason for believing that the person pointed out to the sheriff was really the person against whom the *ca. sa.* was issued, so that there was clearly a total absence of moral turpitude. It had, however, been previously held, in *Humphrys v. Pratt*,² in the House of Lords, that an execution creditor was bound to indemnify a sheriff who had seized goods pointed out by the creditor, and upon his requisition and false representation that they belonged to his debtor, although the counts in the declaration did not aver any knowledge or belief on the part of the execution creditor that his representation was false. On the authority chiefly of this decision in the House of Lords, Lord Denman C. J. held the action in *Evans v. Collins* maintainable, but he added: "One of two persons has suffered by the conduct of the other. The sufferer is wholly free from blame: but the party who caused his loss, though charged neither with fraud nor with negligence, must have been guilty of some fault when he made a false representation. He was not bound to make any statement, nor justified in making any which he did not know to be true; and it is just that he, not the party whom he has misled, should abide the consequence of his misconduct. The allegation *that the defendant knew his representation to be false is therefore immaterial*: without it, the declaration discloses enough to maintain the action."

§ 555. This case was reversed in the Exchequer Chamber,¹ after time taken for consideration, by the unanimous judgment of Tindal C. J., Coltman, Erskine, and Maule, JJ., and Parke, Alderson, Gurney, and Rolfe, BB. The Court stated the question to be distinctly "whether a statement or representation which is *false in fact, but not known to be so by the party making it*, but, on the contrary, made honestly and in the full belief that it is true, affords a ground of action."

² 5 Bligh, N. S. 154.

¹ 5 Q. B. 820.

The Court held, that on the whole current of authority, "*fraud* must concur *with the false statement* in order to give a ground of action." The Court explained the decision in *Humphrys v. Pratt*,² in which no reasons were assigned for *the judgment, as having proceeded on [*422] the ground that the execution creditor in that case had made the sheriff his agent, and was bound to indemnify him for the consequences of acts done under the principal's instructions.

§ 556. The next case was *Ormrod v. Huth*,¹ in the Exchequer Chamber, in 1845, on error from the Exchequer of Pleas, so that the judges of the Queen's Bench must have taken part in the judgment. Tindal C. J. laid down the rule, which he said was supported both by the early and later cases, so clearly as to render it unnecessary to review them, in the following words: "Where upon the sale of goods the purchaser is satisfied without requiring a warranty, (which is a matter for his own consideration), he cannot recover upon a mere representation of the quality by the seller, unless he can show that the representation was bot-tomed in fraud. If, indeed, the representation was false *to the knowledge of the party making it*, this would in general be *conclusive evidence* of fraud; but if the representation was honestly made and believed at the time to be true by the party making it, though not true in point of fact, *we think this does not amount to fraud in law.*"²

Finally the Queen's Bench abandoned their former doctrine in express terms in 1846, Lord Denman C. J. delivering the opinion in *Bailey v. Walford*,³ in these words: "The judgment which was given in this Court in *Evans v. Collins* (5 Q. B. 804) affirming the proposition that every false statement made by one person and believed by another, and so acted upon as to bring loss upon him, constituted a grievance for which the law gives a remedy by action, has been overruled by the Court of Exchequer Chamber, (5 Q.

² 5 Bligh, N. S. 154.

¹ 14 M. & W. 650.

³ See *Bryant v. Crosby*, 36 Me. 562; s. c. 58 Am. Dec. 767; *Cooper*

v. Lovering, 106 Mass. 77; *Pike v.*

Fay, 101 Mass. 134, 137; *Howell v.*

Biddlecom, 62 Barb. (N. Y.) 135.

² 9 Q. B. 197.

B. 829,) . . . and we must admit the reasonableness of the doctrine there at length laid down."

§ 557. The law thus settled has since remained unshaken, and in 1860 the Queen's Bench held that it was established by *Collins v. Evans*, and numerous other authorities, that
 "to support an action for false representation, the
 [*423] representation * must *not only have been false in fact,*
but must also have been made fraudulently."¹

[And in *Dickson v. Reuter's Telegram Company*,² Bramwell L. J. said: "The general rule of law is clear that no action is maintainable for a mere statement although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it."

§ 558. But the rule thus laid down is subject to the important qualification, to which reference has already been made, *ante*, p. 415. A person without knowing that he is stating that which is false, may take upon himself to state that as true as to which he is ignorant, whether it be true or false, and he will then incur, in the event of the statement proving to be false, whatever may be his guilt *in foro conscientia*,¹ the same legal responsibility as though he had made the statement with a knowledge of its falsity. An honest and well grounded belief in the truth of that which is stated affords the only claim to protection, and the absence of any reasonable grounds for such a belief will guide the Court to the conclusion that the belief was never honestly entertained. These reckless statements may be made either

¹ *Childers v. Wooller*, 2 E. & E. 287, and 29 L. J. Q. B. 129. See, also, judgment of Lord Campbell, in *Wilde v. Gibson*, 1 H. L. C. 633.

² 3 C. P. D. 1, 5, C. A.

¹ It is this distinction between the moral complexion and the legal consequences of a statement that has given rise to the unfortunate expressions "legal fraud" or "constructive fraud," expressions which were denounced by Bramwell L. J. in *Weir v. Bell*, 3 Ex. D. at p. 343. "I do

not understand legal fraud. It has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud, or anything else, except where some duty is shown, and correlative right, and some violation of that duty and right. And when these exist, it is much better that they should be stated and acted on than that recourse should be had to a phrase illogical and unmeaning, with the consequent uncertainty."

in wilful ignorance of their truth or falsity, or may be due to forgetfulness of that which it is a man's duty to remember.² * In either case the same consequences [*424] will result to the person making them. The Court will not enter into any question as to the state of a man's mind, if it be proved that the statement was untrue to his knowledge.³]

§ 559. In the *Western Bank of Scotland v. Addie*,¹ the charge to the jury was, that "if the directors took upon themselves to put forth in their report statements of importance in regard to the affairs of the bank, false in themselves, and which *they did not believe, or had no reasonable ground to believe* to be true, that would be a misrepresentation and deceit." In the House of Lords, the Lord Chancellor (Lord Chelmsford) approved this direction, saying: "Suppose a person makes an untrue statement which he asserts to be the result of a *bonâ fide* belief of its truth, how can the *bonâ fides* be tested, except by considering the ground of such belief? And if an untrue statement is made founded upon a belief which is destitute of all reasonable grounds, or which the least inquiry would immediately correct, I do not see that it is not fairly and correctly characterized as misrepresentation and deceit." But Lord Cranworth thought this was going rather too far, and said: "I confess that my opinion was that in what his Lordship thus stated, he went beyond what principle warrants. If persons in the situation of directors of a bank make statements as to the condition of its affairs, which they *bonâ fide* believe to be true, I cannot think they can be guilty of fraud, because other persons think, or the

² *Burrowes v. Lock*, 10 Ves. 470; *Slim v. Croucher*, 1 De G. F. & J. 518. From an early period equity exercised a concurrent jurisdiction in cases of false representation, and entertained suits which were analogous to the common law actions of deceit. *Evans v. Bicknell*, 6 Ves. 173, *per* Lord Eldon; *Ramshire v. Bolton*, 8 Eq. 294. It seems clear that equity applied the same principles to such

suits as were applied at common law (see *per* Lord Chelmsford, in *Peek v. Gurney*, L. R. 6 H. L. at p. 390; and *per* Cotton L. J. in *Schroeder v. Mendl*, 37 L. T. N. S. 452, at p. 454); but the question is one of only historical interest since the Judicature Acts.

³ *Hine v. Champion*, 7 Ch. D. 344.

¹ L. R. 1 Sc. Ap. 145.

Court thinks, or your Lordships think, that there was no sufficient ground to warrant the opinion which they had formed. If a little more care or caution must have led the directors to a conclusion different from that which they put forth, this may afford strong evidence to show that they did not really believe in the truth of what they stated, [*425] and so *that they were guilty of fraud. But this would be the consequence not of their having stated as true what they had not reasonable ground to believe to be true, but of their having stated as true what they did not believe to be true."

§ 560. In the *Reese River Company v. Smith*,¹ it was said by Lord Cairns, that the settled rule of law was, "that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or not, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue."² In this Lords Hatherley and Colonsay concurred.

§ 561. [And in *Weir v. Bell*,¹ Cotton L. J. stated it to be a well-established rule, that "in an action of deceit a defendant may be liable not only if he has made statements which he knows to be false, but if he has made statements which in fact are untrue, recklessly: that is, *without any reasonable grounds for believing them to be true*, or under circumstances which show that he was careless whether they were in fact true or false."

This statement of the law confirms the opinion of Lord Chelmsford in the *Western Bank of Scotland v. Addie*

¹ L. R. 4 H. L. 64.

² *False representations, made as an inducement to a contract, do not universally constitute fraud* if the other party had an opportunity to detect the falsehood. *Bondurant v. Crawford*, 22 Iowa, 40, 47. It seems that to render such misrepresentations fraudulent they must amount to a warranty. See *Binnard v. Spring*, 42 Barb. (N. Y.) 470; *Seixas v. Woods*, 2 Cai. (N. Y.) 48; s. c. 2 Am. Dec. 215;

Holden v. Daken, 4 Johns. (N. Y.) 421. Where a defence is set up that the plaintiff falsely represented the articles sold to be of a particular quality to support such defence, the defendant must prove not only the representations were untrue, but that the plaintiff knew them to be so at the time. *King v. Eagle Mills*, 92 Mass. (10 Allen) 548.

¹ 3 Ex. D. 238, C. A. at p. 242.

(*vide supra*), and accurately defines the principle which runs through numerous decisions.²

§ 562. Before leaving this branch of the subject, it is important to observe that all the following circumstances must concur in order to support an action of deceit:—

1. The representation must be made to the plaintiff, or with the direct intent that it should be communicated to him, and that he should act upon it.

2. It must be false in fact.

3. It must be false to the knowledge of the defendant, or made by him recklessly; that is to say, without reasonable * grounds for believing it to be true or un- [*426] der circumstances which show that he was careless, whether it was in fact true or false.¹

4. It must be a material one.

5. The plaintiff must have acted upon the faith of it, and thereby suffered damage; and where the meaning of the representation is ambiguous, it is for the plaintiff to show that he understood it in the sense in which it is false.

The above propositions are established by the cases already referred to, and by the two recent decisions of the Court of Appeal in *Arkwright v Newbold*² and *Smith v. Chadwick*.³

² *Rawlins v. Wickham*, 3 De G. & J. 304, 316; *Hart v. Swaine*, 7 Ch. D. 42; *Leddell v. McDougall*, 29 W. R. 403, C. A.; *Redgrave v. Hurd*, 20 Ch. D. 1, C. A. *per* Jessel M. R. at p. 12; *Smith v. Chadwick*, *ibid.* 27, *per eundem*, at p. 44, and *per* Cotton L. J. at p. 68; *Mathias v. Yetts*, 46 L. T. N. S. 497, C. A. The rule had been laid down to the same effect by Maule J. in *Evans v. Edmonds*, 13 C. B. 777 at p. 786.

¹ *Einstein v. Marshall*, 58 Ala. 153, 162; s. c. 29 Am. Rep. 729; *Pike v. Fay*, 101 Mass. 134; *King v. Eagle Mills*, 92 Mass. (10 Allen) 548; *Dulaney v. Rogers*, 64 Mo. 201; *Dilworth v. Bradner*, 85 Pa. St. 238; *Bokee v. Walker*, 14 Pa. St. 139; *Dunn v. White*, 63 Mo. 181; *Lord v. Goddard*, 54 U. S. (13 How.) 198, 211; bk. 14, L. ed. 111.

² 17 Ch. D. 301, C. A.

³ 20 Ch. D. 27, C. A.

False affirmations made with intent to defraud whereby the plaintiff sustained damages are ground of an action upon the case in the nature of deceit. *Medbury v. Watson*, 47 Mass. (6 Metc.) 246, 259; s. c. 39 Am. Dec. 726. And he may maintain an action for the injury sustained, although he has sold the property. *Medbury v. Watson*, 47 Mass. (6 Metc.) 246; s. c. 39 Am. Dec. 726. However, an exception exists in the case of mere naked assertions, although they are known to be false at the time. *Medbury v. Watson*, 47 Mass. (6 Metc.) 246, 259; s. c. 39 Am. Dec. 726.

The effect of an action for deceit has been held to be to affirm the sale. *Bacon v. Bown*, 1 Bibb (Ky.) 384;

§ 563. So much with regard to the action of deceit. As to the buyer's right to rescind a contract induced by false representation, the principles adopted and applied by Courts of Equity had, before the Judicature Act, a much wider scope than those of the Common Law. At Common Law, except in the case of an innocent misrepresentation affecting the substance of the contract,¹ the buyer's right to rescind was governed by the same considerations as would have entitled him to maintain an action of deceit, but it seems clear that to obtain relief in Equity, it was sufficient for the buyer to prove that the representation was a material one inducing the contract, and was *false in fact*.² As we have already stated (*ante*, p. 403), relief was only granted where *restitutio in integrum* was possible, and where the buyer had

s. c. 4 Am. Dec. 640; *Kimball v. Cunningham*, 4 Mass. 502; s. c. 3 Am. Dec. 230. Other cases, however, hold such an action is not necessarily an affirmance. *Dayton v. Monroe*, 47 Mich. 193; *Lenox v. Fuller*, 39 Mich. 268; *Miller v. Barber*, 66 N. Y. 558, 564; *Hubbell v. Meigs*, 50 N. Y. 480, 487; *Hersey v. Benedict*, 15 Hun (N. Y.) 282, 288; *Emma Co. (Lim.) v. Emma Co.*, 7 Fed. Rep. 401, 420.

¹ *Ante*, p. 376.

² *Rawlins v. Wickham*, 3 De G. & J. 304; *Leather v. Simpson*, 11 Eq. 398-406, *per* Malins V.-C.; *Hart v. Swaine*, 7 Ch. D. 42; *Schroeder v. Mendl*, 37 L. T. N. S. 452, *per* Cotton L. J. at p. 454; *Redgrave v. Hurd*, 20 Ch. D. 1, C. A.

American authorities.—*Einstein v. Marshall*, 58 Ala. 153; s. c. 29 Am. Dec. 729; *Sledge v. Scott*, 56 Ala. 202; *Bower v. Fenn*, 90 Pa. St. 354; s. c. 35 Am. Dec. 359; *Loper v. Robinson*, 54 Tex. 511. As to when third person will be responsible for fraudulent representations. *Einstein v. Marshall*, 58 Ala. 153, 159; s. c. 29 Am. Dec. 729; *Hall v. Bradbury*, 40 Conn. 32; *Corbett v. Gilbert*, 24 Ga. 454; *Harrison v. Savage*, 19 Ga. 310;

Smither v. Calvert, 44 Ind. 242; *Tryon v. Whitmarsh*, 42 Mass. (1 Metc.) 1; s. c. 35 Am. Dec. 339; *Patton v. Gurney*, 17 Mass. 182; *Devoe v. Brandt*, 53 N. Y. 462; *Viele v. Goss*, 51 N. Y. 624, affirming s. c. 49 Barb. (N. Y.) 96; *Marsh v. Falker*, 40 N. Y. 562; *Zabriskie v. Smith*, 13 N. Y. 322; s. c. 64 Am. Dec. 551; *Morgan v. Skidmore*, 55 Barb. (N. Y.) 263; *Viele v. Goss*, 49 Barb. (N. Y.) 96; *Wakeman v. Dalley*, 44 Barb. (N. Y.) 498; *Shaw v. Stine*, 8 Bosw. (N. Y.) 157; *Ballard v. Lockwood*, 1 Daly (N. Y.) 158; *Bean v. Renway*, 17 How. (N. Y.) Pr. 90; s. c. 28 Barb. (N. Y.) 466; *Upton v. Vail*, 6 Johns. (N. Y.) 181; s. c. 5 Am. Dec. 210; *Van Bruck v. Peyser*, 4 Robt. (N. Y.) 514; *Raymond v. Howland*, 12 Wend. (N. Y.) 176; *Addington v. Allen*, 11 Wend. (N. Y.) 374; *Rheem v. Naugatuck Wheel Co.*, 33 Pa. St. 358; *Lord v. Goddard*, 54 U. S. (13 How.) 198; bk. 17, L. ed. 111; *Russell v. Clark*, 11 U. S. (7 Cr.) 69; bk. 3, L. ed. 271; *Pasley v. Freeman*, 3 T. R. 51; *De Graves v. Smith*, 2 Campb. 533; *Corbett v. Brown*, 5 Car. & P. 363; *Haycraft v. Creasy*, 2 East, 92; *Hutchinson v. Bell*, 1 Taunt. 558.

elected to rescind within a reasonable time after discovering that the representation was false.

§ 564. The grounds of the doctrine in Equity were stated by the present Master of the Rolls in a very recent case.¹ He says "It was put in two ways, either of which was sufficient. One way of putting the case was, 'a man is not to be allowed to get a benefit from a statement which he now admits to be false. * He is not to be allowed to [*427] say, for the purpose of civil jurisdiction, that when he made it he did not know it to be false; *he ought to have found that out before he made it.*' The other way of putting it was this: 'even assuming that moral fraud must be shown in order to set aside a contract, you have it where a man, *having obtained a beneficial contract by a statement which he now knows to be false, insists upon keeping that contract.* To do so is a moral delinquency: no man ought to seek to take advantage of his own false statements.'"²

And now, since the Judicature Acts, the variance that existed between the rules of Common Law and Equity before these statutes came into operation, has disappeared, and the equitable rule will henceforth apply in all cases.³

§ 565. It is necessary to guard the reader against concluding that the case of *Cornfoot v. Fowke*,¹ has remained unquestioned upon the point that the principal will not be liable for the consequences of false representations made by his agent, with full belief in their truth, when the principal himself has a knowledge of the real facts. In *The National Exchange Company of Glasgow v. Drew*,² it was commented on by Lords Cranworth and St. Leonards, the latter learned Lord saying, distinctly: "I should feel no hesitation, if I had myself to decide that case, in saying, that although the representation was not fraudulent, — the agent not knowing that it was false, — yet that as it in fact was false, and false

¹ *Redgrave v. Hurd*, *ubi supra*, at p. 12.

² And see *per* Lord Blackburn in *Brownlie v. Campbell*, 5 App. Cas. at p. 950.

³ Judicature Act, 1873, s. 25, sub-s. 11. See *per* Jessel, M. R. in *Redgrave v. Hurd*, 20 Ch. D. 1, C. A. at p. 12.

¹ 6 M. & W. 358.

² 2 Macq. 103.

to the knowledge of the principal, it ought to *vitate the contract*;" [and the principle as thus stated was adopted by Lord Selborne in *Ludgater v. Love*.³] Lord Campbell, also, in *Wheelton v. Hardisty*,⁴ said, "As to *Cornfoot v. Fowke*, which was brought before us to illustrate the liability of a principal for his agent, I am not called upon to say whether that case was well decided by the majority of the [*428] *judges in the Exchequer, although the voice of Westminster Hall was, I believe, rather in favor of the dissentient Chief Baron."

And in *Barwick v. The English Joint Stock Bank*,⁵ Willes J. said, "I should be sorry to have it supposed that *Cornfoot v. Fowke* turned upon any thing but a point of pleading."

§ 566. [In *Ludgater v. Love*,¹ the defendant's son, acting as the defendant's agent, had innocently represented that certain sheep which he sold to the plaintiff were sound. The defendant had previously *instructed* his son to represent that the sheep were sound, *knowing* that they were in fact affected with disease, but fraudulently withholding from his son knowledge of the truth. Held, by the Court of Appeal, following the dicta of the Judges (Rolfe, Alderson, and Parke, BB.) in *Cornfoot v. Fowke*,² that the defendant was liable in an action for damages for the fraudulent misrepresentation.

Lord Selborne cited at length (at p. 697) the observations of Lord St. Leonards in *The National Exchange Company v. Drew*,³ and pointed out that the case under consideration was identical with the one there suggested by that learned lord.]

§ 567. The subject was much discussed in *Udell v. Atherton*,¹ which, it is submitted, has been misunderstood to some extent.² The facts were these: The defendant's traveller

³ 44 L. T. N. S. 694, C. A. *post*, p. 428.

⁴ 8 E. & B. 270; 26 L. J. Q. B. 265-275.

⁵ L. R. 2 Ex. 259; 36 L. J. Ex. 147.

¹ 44 L. T. N. S. 694, C. A.

² 6 M. & W. 358.

³ 2 Macq. 103, at p. 145.

¹ 7 H. & N. 172; 30 L. J. Ex. 337.

² See note at p. 794 of Broom's *Leg. Max.* (5th ed.) and 2 Sm. L. C. p. 92 (8th ed.).

sold a log of mahogany to the plaintiff, and warranted it sound, without authority, and *knowing that it was defective*. The buyers gave two bills of exchange for the price, at four and six months. The first bill was paid; before the maturity of the second bill, the plaintiff, who had been in possession of the log from the time of the sale, ordered it to be cut up, and then discovered that there was a defect, which reduced its value one half. This defect was patent on inspection, * for it had been pointed out to the traveller [*429] on a previous occasion, when he attempted to sell the log to another person. The defendant was wholly innocent, knowing nothing either of the defect, or of the fraudulent representation of the traveller. The purchaser, on the defendant's refusal to make an allowance, brought an action *for deceit*. The Court was equally divided, Pollock C. B. and Wilde B. holding the action to be maintainable, and Bramwell and Martin BB. holding the contrary. But the two last-named judges dissented solely on the ground that the defendant was not liable *in that form of action*: and Martin B. very distinctly admitted that the buyer would have had the right to *rescind the contract*, on the ground of fraud committed by the agent, if the plaintiff had not deprived himself of this remedy, by cutting up and using the log, so that he could not restore it. All the judges were of opinion that the fraud of the agent would affect the validity of the contract, but Martin B. pointed out, as the true distinction, that "in an action *upon the contract*, the representation of the agent is the representation of the principal, but in an *action on the case for deceit*, the misrepresentation or concealment must be proved against the principal."

§ 568. In the year 1867, two decisions, apparently not reconcilable, were rendered at about the same time by appellate Courts, each being ignorant of the case pending in the other.

In *Barwick v. The English Joint Stock Bank*,¹ the case was argued in the Exchequer Chamber on the 8th of February, and the judgment rendered on the 18th of May by

¹ L. R. 2 Ex. 259; 36 L. J. Ex. 147.

Willes J. in behalf of himself and Blackburn, Keating, Mellor, Montague Smith, and Lush, JJ.

In the *Western Bank of Scotland v. Addie*,² the case was argued in the House of Lords in the beginning of March, and judgment was rendered on the 20th of May, just two days after the decision in the Exchequer Chamber.

§ 569. In *Barwick v. The English Joint Stock Bank*, the fraud was committed by the manager of the defendant's bank * acting in the course of his business, and the third count in the declaration was for fraud and deceit by the defendants, to which they pleaded not guilty. Held, that the fraud committed by the manager was properly charged in the declaration, as the fraud of the defendants, and that the defendants were liable for the fraud of their agents. The fraud committed was the giving of a guaranty by the manager in behalf of the bank, *he* knowing and intending that the guaranty should be unavailing, and fraudulently concealing from the plaintiff the facts which would make it so.

§ 570. Willes J. in delivering the judgment (at p. 265) declared that in so deciding, "we conceive that we are in no respect overruling the opinions of my brothers Martin and Bramwell in *Udell v. Atherton*,¹ the case most relied on for the purpose of establishing the proposition that the principal is not answerable for the fraud of his agent. Upon looking at that case, it seems pretty clear that the division of opinion which took place in the Court of Exchequer arose, not so much upon the question whether the principal is answerable for the act of an agent in the course of his business, a question which was settled as early as Lord Holt's time (*Hern v. Nichols*, 1 Salk. 289),² but in applying that principle

² L. R. 1 Sc. App. 146.

¹ 7 H. & N. 172; 30 L. J. Ex. 337.

² *A principal being liable for his agent's acts within the general scope of his authority although contrary to his private instructions, the principal will be responsible for any fraudulent misrepresentation made by an agent*

in effecting a sale, which sale the principal ratifies. *Toledo W. & W. R. Co. v. Rodrigues*, 47 Ill. 188; *Minter v. Pacific R. R. Co.*, 41 Mo. 503; *Hill v. Miller*, 76 N. Y. 32; *Exchange Bank v. Monteath*, 26 N. Y. 505; *Scott v. McGrath*, 7 Barb. (N. Y.) 53; *Commercial Bank v.*

to the peculiar facts of the case; the act which was relied upon there as constituting a liability in the sellers, having been an act adopted by them under peculiar circumstances, and the author of that act not being their *general* agent in business as the manager of a bank is."

As to the distinction here pointed out between the responsibility of the principal for the fraud of an agent employed to effect *one* sale, and that of an agent to do business *generally*, it is not easy to appreciate how the principle can differ

Norton, 1 Hill (N. Y.) 501; Beals v. Allen, 18 Johns. (N. Y.) 363; s. c. 9 Am. Dec. 221; Munn v. Commission Co., 15 Johns. (N. Y.) 44; s. c. 8 Am. Dec. 219; Lightbody v. North American Ins. Co., 23 Wend. (N. Y.) 18; Rossiter v. Rossiter, 8 Wend. (N. Y.) 494; s. c. 24 Am. Dec. 62; Winne v. Niagara Ins. Co., 13 N. Y. Week. Dig. 332; Hewitt v. Davies, 7 N. Y. Week. Dig. 183; Reaney v. Culbertson, 21 Pa. St. 507; Butler v. Maples, 76 U. S. (9 Wall.) 760; bk. 19, L. ed. 822; Calais Steamboat Co. v. Van Petit, 67 U. S. (2 Black) 372; bk. 15, L. ed. 348; East India Co. v. Hensley, 1 Esp. 111; Todd v. Emly, 7 Mees. & W. 427; Sykes v. Giles, 5 Mees. & W. 645; Flemyng v. Hector, 2 Mees. & W. 178.

General and special agents. — There is an important distinction between general and special agency as affecting the liability of the principal. A general agent represents his principal in all matters generally pertaining to the business committed to him, but a special agent only represents his principal under a limited power for a particular purpose. Toledo W. & W. R. Co. v. Rodrigues, 47 Ill. 188; Cruzan v. Smith, 41 Ind. 288; Minter v. Pacific R. R. Co., 41 Mo. 503; Shelton v. Merchants' Despatch Transportation Co., 59 N. Y. 258; Nelson v. Hudson R. R. Co., 48 N. Y. 498; Exchange Bank v. Monteath, 26 N. Y. 505; Commercial Bank v. Norton, 1 Hill (N. Y.) 501; Anderson v. Coonley,

21 Wend. (N. Y.) 279; Jeffrey v. Bigelow, 13 Wend. (N. Y.) 518; s. c. 38 Am. Dec. 476; Johnson v. Southworth, 3 N. Y. Week. Dig. 319; Whitehead v. Tuckett, 15 East, 400. Any act of a general agent within the scope of his authority, and any representation made by him will be binding upon the principal; but the authority of a special agent must be strictly pursued and his representations must have been specially authorized to bind the principal. Thompson v. Stewart, 3 Conn. 172; s. c. 8 Am. Dec. 168; Stollenwreck v. Thacher, 115 Mass. 224; Snow v. Perry, 26 Mass. (9 Pick.) 539; Gordon v. Buchanan, 5 Yerg. (Tenn.) 71; Talmage v. Third Nat. Bank, 91 N. Y. 531; Merchants' Bank v. Livingston, 74 N. Y. 223; Martin v. Farnsworth, 49 N. Y. 555; McNeil v. Tenth Nat. Bank, 46 N. Y. 325; s. c. 7 Am. Rep. 341; Nixon v. Palmer, 8 N. Y. 398; Andrews v. Kneeland, 6 Cow. (N. Y.) 354; Davenport v. Buckland, Hill & Den. (N. Y.) 75; Collins v. Ralli, 20 Hun (N. Y.) 246; Beals v. Allen, 18 Johns. (N. Y.) 363; s. c. 9 Am. Dec. 221; Munn v. Commission Co., 15 Johns. (N. Y.) 44; s. c. 8 Am. Dec. 219; Batty v. Carswell, 2 Johns. N. Y. 48; Deming v. Bailey, 2 Robt. (N. Y.) 1; Williams v. Walker, 2 Sandf. Ch. (N. Y.) 325; Delafield v. Illinois, 26 Wend. (N. Y.) 192; s. c. 2 Hill (N. Y.) 159; Blane v. Proudfit, 3 Call (Va.) 207; s. c. 2 Am. Dec. 546.

in the two cases, if in each, the agent is acting in the business for which he was employed by the principal: but the observation of the learned judge on this point is of course no part of the decision in the cause.

[*431] § 571. * [In that part of his judgment which immediately follows the foregoing passage, Willes J. lays down some general principles of law which have been fully recognized in subsequent cases. He continues: "But with respect to the question, whether a principal is answerable for the act of his agent in the course of his master's business, and for his master's benefit, *no sensible distinction can be drawn between the case of fraud and the case of any other wrong.* The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved;" and then, after illustrating the application of the principle to various cases, he adds: "In all these cases it may be said, as it was said here, that the master has not authorized the act. *It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.*"

These principles have been expressly adopted in a subsequent series of cases including the two recent decisions of the Judicial Committee of the Privy Council in *Mackay v. The Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; and in *Swire v. Francis*, 3 App. Cas. 106; and by Lord Selborne in *Houldsworth v. The City of Glasgow Bank*, 5 App. Cas. 317, *post*, p. 435.

And in *Weir v. Bell*,¹ Bramwell L. J. while considering the reasoning of Mr. Justice Willes unsatisfactory on the ground that there is an obvious distinction between fraud and any other tort, viz., that fraud is wilful, and a master, as a rule, is not liable for the wilful wrong of his servant, yet considered that the rule laid down was a

¹ 3 Ex. D. 238, C. A. at p. 244.

useful one and that the case might be supported on another ground, viz., that any person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given.

* The principles, therefore, laid down by Willes J. [*432] may now be taken to be the recognized law upon the subject.]

§ 572. On the other hand, in the *Western Bank of Scotland v. Addie*,¹ at the close of the argument on the 12th of March, the Lords intimated that “as the decisions conflicted, they would take time to consider the case, *with a view to the laying down of some general rules*,” and it was not till the 20th of May that the decision was given.

The plaintiff's action was based on the allegation that he had been induced to buy *from the company* a number of its shares by the fraudulent representations of its *agents, the directors*. The demand, according to the forms of the Scotch law, was in the alternative for a *restitutio in integrum*, or for damages. The principles governing the case were laid down by the Lord Chancellor (Lord Chelmsford), and by Lord Cranworth, in entire conformity with the opinion of Martin B. in *Udell v. Atherton*. Lord Chelmsford said: “The distinction to be drawn from the authorities, and which is sanctioned by sound principle, appears to be this:—where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors in the name of the company seek *to enforce that contract*, or the person who has been deceived institutes a suit against the company to *rescind the contract* on the ground of fraud, the misrepresentations are *imputable to the company*, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which they have obtained through the fraud of their agents. But if the person who has been induced to purchase shares by the fraud of the directors, instead of seeking to set aside the contract prefers *to bring an action for damages for the*

¹ L. R. 1 Sc. App. 146.

deceit, such an action cannot be maintained against the company, but only against the directors personally." . . .

"It may seem a hardship on the pursuer that he should be compelled to keep the shares, because, in ignorance of the fraud practised on him, he retained them until an event occurred which changed their nature, and prevented [*433] his *returning the very thing which he received.

But he is not without remedy. If he is fixed with the shares, he may still have his action for damages against the directors, supposing he is able to establish that he was induced to enter into the contract by misrepresentations for which they are responsible."

§ 573. Lord Cranworth first concurred in deciding that the plaintiff had lost his right to rescind the contract, because he was unable to put the adverse parties in the same situation in which they stood when the contract was entered into. On the other point, his Lordship said: "*The appellants are not the persons who were guilty of the fraud.* . . . An incorporated company cannot in its corporate character be called on to answer *in an action for deceit*. But if by the fraud of its agents third persons have been defrauded, the corporation may be made responsible to the extent to which its funds have profited by those frauds. If it is supposed from what I said when the case of *Ranger v. Great Western Railway Company*,¹ was decided in this House, I meant to give as my opinion that the company could in that case have been made to *answer as for a tort in an action for deceit*, I can only say I had no such meaning. . . . In what I said, I merely wished to guard against its being supposed that I assented to the argument, that there would be *no means of reaching the company*, if the fact of the fraud had been established. By what particular proceeding relief could have been obtained is a matter on which I did not intend to express, and indeed had not formed any opinion.

"An attentive consideration of the cases has convinced me that the true principle is that these corporate bodies, through whose agents so large a portion of the business of the coun-

¹ 5 H. L. C. 72

try is now carried on, may be made responsible for the frauds of those agents to *the extent to which the companies have profited from these frauds ; but that they cannot be sued as wrongdoers, by imparting to them the misconduct of those whom they have employed.*² A person defrauded by *directors*, if the subsequent acts and dealings of the parties have been such as to leave him no remedy but an action *for [*434] the fraud, *must seek his remedy against the directors personally.*" The plaintiff was therefore held not entitled to recover on either ground.³

§ 574. It is submitted that this being the tribunal of the last resort, this case must be considered as settling conclusively, that where a purchaser has been induced to buy through the fraud of an agent of the vendor, the latter being innocent, the purchaser may

1st. Rescind the contract, if he can return the thing bought in the condition in which he received it, but not otherwise : or he may.

2dly. Maintain an action for deceit against the agent personally ; but

3dly. Cannot maintain that, or any action in *tort*, against the innocent principal.

Further, that though he would have a claim against the principal for a return of the price to the extent to which the latter has profited by the fraud of his agent, his remedy would be in equity ; for it was admitted on all sides, in *Udell v. Atherton*, that if the action for deceit would not lie, the purchaser was remediless at law, when not in a condition to sue for a rescission, there being no form of action at law applicable to the case.

² *Kennedy v. McKay*, 43 N. J. L. (14 Vr.) 288 ; s. c. 39 Am. Rep. 581 ; *Allerton v. Allerton*, 50 N. Y. 670 ; *Davis v. Bemis*, 40 N. Y. 453 n. ; *Elwell v. Chamberlin*, 31 N. Y. 619 ; *Graves v. Spier*, 58 Barb. (N. Y.) 387 ; *Chester v. Dickerson*, 52 Barb. (N. Y.) 349 ; *Sharp v. New York*, 40 Barb. (N. Y.) 257 ; *Hunter v. Hudson River Iron Co.*, 20 Barb. (N. Y.) 493 ; *Craig*

v. Ward, 3 Keyes (N. Y.) 393 ; *Durst v. Burton*, 2 Lans. (N. Y.) 137 ; s. c. 47 N. Y. 167 ; *Sandford v. Handy*, 23 Wend. (N. Y.) 260 ; *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 146.

³ See *Kennedy v. McKay*, 43 N. J. L. (14 Vr.) 288 ; s. c. 39 Am. Rep. 581. See, also, *Udell v. Atherton*, 7 H. & N. 172 ; *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 146.

§ 575. [It is necessary to reconsider the 3d principle above laid down in the light of more recent decisions.

In *Swift v. Winterbotham*,¹ decided in 1873, the Court of Queen's Bench (Cockburn C. J. and Quain J.) following *Barwick v. The English Joint Stock Bank*, held the Gloucestershire Banking Company liable for the false representation of its manager, made in the course of conducting the business of the bank.

In *Mackay v. The Commercial Bank of New Brunswick*,² decided in 1874, one Sancton, the cashier of the defendant bank, *whose duty it was to obtain the acceptance of bills* [*435] *in which the *bank was interested*, sent a telegram to the plaintiffs whereby he falsely, but without the knowledge of the president and directors of the bank, made a representation to the plaintiffs, which, by omitting a material fact, misled them, and induced them to accept certain bills in which the bank was interested, which bills the plaintiffs had to pay, and *of which the defendant bank obtained the benefit*, and it was held, contrary to the dicta of Lords Chelmsford and Cranworth in the case of *The Western Bank of Scotland v. Addie*, that the bank was liable in an action of deceit, the false representation having been made by Sancton within the scope of his authority and for the benefit of the bank, and they having profited by it.

Their lordships, however, refrained from stating what their decision would have been —

- (1) If the plaintiffs had not proved that the bank had profited by the fraud of their agent;
- (2) If they had not proved the representations of Sancton to have been made within the scope of his authority, but had proved that the defendants accepted the benefit of it with notice of the fraud.

§ 576. In *Houldsworth v. The City of Glasgow Bank and Liquidators*, decided in 1880,¹ the plaintiff had bought from

¹ L. R. 8 Q. B. 244, overruled in Ex. Ch. L. R. 9 Q. B. 301 (*sub nom. Swift v. Jewsbury*) upon another point, without impugning the

general doctrine. *Per Coleridge C. J.* at p. 312.

² L. R. 5 P. C. 394.

¹ 5 App. Cas. 317.

The City of Glasgow Bank a co-partnership registered with unlimited liability under the Companies Act, 1862, 4,000*l.* of its stock in 1877. He was registered as a partner, received dividends, and acted as a partner until the liquidation. In October, 1878, the bank went into liquidation, and the plaintiff was entered on the list of contributories and paid calls. In December, 1878, he brought this action, in the nature of an action of deceit, against the bank and its liquidators to recover damages in respect of the sum he had paid for the stock, the money he had already paid for calls, and the estimated amount of future calls. He found his claim to relief on the ground that he was induced to buy the stock by reason of the fraudulent misrepresentations and concealments of the manager and directors. He admitted that after the winding up had *commenced it was too [*436] late for him to claim rescission of his contract and *restitutio in integrum*. It was held by the House of Lords that the action was irrelevant and not maintainable. The distinction between shares in a company and any other chattels, viz., that a shareholder in a company is a partner in it, was pointed out, and it was shown that any attempt, while he remains a partner in the company, to throw upon the assets of the company and the other contributories the loss he had sustained was at variance with the contract he had entered into with his partners, viz., that the assets and contributions shall be applied in payment of the debts and liabilities of the company, which contract he had, by remaining in the company until its liquidation, chosen to affirm. The *decision* in *The Western Bank of Scotland v. Addie* was approved and followed. But, on the question whether a corporation can be called on to answer in an action of deceit by a person other than a shareholder, the reader is referred to the judgments of Lord Selborne,² and Lord Blackburn,³ where the previous cases are discussed, particularly *Barwick v. The English Joint Stock Bank*, *The Western Bank of Scotland v. Addie*, and *Mackay v. The Commercial Bank of New Brunswick*.

² 5 App. Cas. 326.³ At p. 338.

§ 577. Lord Selborne,¹ adopts the principle laid down by Mr. Justice Willes in the first of those cases, and adds, "That principle received full recognition from this House in *The National Exchange Co. v. Drew*² and *New Brunswick Railway Co. v. Conybeare*,³ and was certainly not meant to be called in question by either of the learned Lords who decided *The Western Bank of Scotland v. Addie*. It is a principle not of the law of torts or of fraud or deceit, but of the law of agency, *equally applicable whether the agency is for a corporation (in a matter within the scope of the corporate powers) or for an individual*, and the decision in all these cases proceeded, not on the ground of any imputation of vicarious fraud to the principal, but because (as it was well put by Mr. Justice Willes in Barwick's case) "with respect to the question, whether a principal is answerable [*437] for the act of his agent in * the course of his master's business, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." And Lord Blackburn,⁴ points out that Lord Chelmsford in *The Western Bank of Scotland v. Addie*, laid down no general position as to all contracts, and that his dicta and those of Lord Cranworth (who *does* use language applicable to all contracts) are reconcilable with Barwick's and Mackay's cases if confined to the particular and peculiar contract then under consideration, viz., a contract to take shares, adding, in conclusion,⁵ "I do not say that the difference of the contract from that to buy shares would distinguish the case. All that I say is that if such a case arises, the consideration of the question whether it is decided by *Addie v. The Western Bank* is not meant to be prejudiced by anything I now say."

§ 578. The combined effect of the decisions in *The Western Bank of Scotland v. Addie* and *Houldsworth v. The City of Glasgow Bank*, is that the only remedy of a shareholder in a joint stock company, who has been induced to purchase

¹ 5 App. Cas. 326.

² 2 Macq. 103.

³ 9 H. L. C. 711.

⁴ 5 App. Cas. 339.

⁵ At p. 341.

shares by the fraud of the agent of the company, is rescission of his contract and *restitutio in integrum*. If he is once debarred from seeking that relief by the declared insolvency of the company or from any other cause, there is no other remedy open to him except to bring a personal action against the agent who has been actually guilty of the fraud.

It is submitted, therefore, that the 3d proposition above laid down (*ante*, p. 434) must be modified thus:—

3dly. The purchaser can maintain an action of deceit against the innocent principal, where the fraud of the agent has been committed within the scope of his authority, and where the principal has been benefited by it.¹

4thly. In this respect it makes no difference whether the principal be a corporation or an individual.²

¹ *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259; *Mackay v. The Commercial Bank of New Brunswick*, L. R. 5 P. C. 394; *per Fry J.* in *Cargill v. Bower*, 10 Ch. D. at p. 514.

² *Mackay v. The Commercial Bank of New Brunswick*, *ubi supra*; *Houldsworth v. The City of Glasgow Bank*, 5 App. Cas. 317, *per Lord Selborne*, at p. 326, and the more guarded remarks of Lord Blackburn, at pp. 339, 340.

The liability of principal for deceit of agent.—The principal will be liable for the deceit of his agent in an act within the scope of his authority. See *Reed v. Peterson*, 91 Ill. 288, 298; *Durant v. Rogers*, 87 Ill. 508, 511; *McBean v. Fox*, 1 Ill. App. 177, 185; *Linton v. Housh*, 4 Kans. 535; *Haskit v. Elliott*, 58 Ind. 493; *Fairfield Savings Bank v. Chase*, 72 Me. 226, 230; *Lamm v. Port Deposit Association*, 49 Md. 233, 241; s. c. 23 Am. Rep. 246; *Tome v. Parkersburg Branch R. R.*, 39 Md. 36, 71, 85; *Coddington v. Goddard*, 82 Mass. (16 Gray) 436, 441; *Commonwealth v. Nichols*, 51 Mass. (10 Metc.) 259; s. c. 43 Am. Dec. 432; *Locke v. Stearns*, 42 Mass. (1 Metc.) 560; s. c. 35 Am. Dec. 382; *Lawrence v. Hand*, 23 Miss. 103;

Indianapolis, P. & C. Ry. Co. v. Tyng, 63 N. Y. 653, 655; *Wakeman v. Dalley*, 51 N. Y. 27; *Davis v. Bemis*, 40 N. Y. 453 (note); *Elwell v. Chamberlin*, 31 N. Y. 611, 619; *Griswold v. Haven*, 25 N. Y. 595; *Bennett v. Judson*, 21 N. Y. 238; *Craig v. Ward*, 3 Keyes (N. Y.) 387; *Sandford v. Handy*, 23 Wend. (N. Y.) 260, 268; *Keough v. Leslie*, 92 Pa. St. 424; *Mundorff v. Wickersham*, 63 Pa. St. 87; s. c. 3 Am. Rep. 531; *Tagg v. Tennessee Nat. Bank*, 9 Heisk. (Tenn.) 479; *Fitzsimmons v. Joslin*, 21 Vt. 129; s. c. 52 Am. Dec. 48; *Crump v. United States Mining Co.*, 7 Gratt. (Va.) 352, 369; s. c. 56 Am. 116; *Law v. Grant*, 37 Wis. 548, 557; *Stockwell v. United States*, 80 U. S. (13 Wall.) 531, 550; bk. 20, L. ed. 491; *Cliquot's Champagne*, 70 U. S. (3 Wall.) 114, 140; bk. 18, L. ed. 116; *Barreda v. Silsbee*, 62 U. S. (21 How.) 146, 164; bk. 16, L. ed. 86; *Veazie v. Williams*, 49 U. S. (8 How.) 134, 157; bk. 12, L. ed. 1018; *American Fur Co. v. United States*, 27 U. S. (2 Pet.) 363, 368; bk. 7, L. ed. 450; *United States v. Gooding*, 25 U. S. (12 Wheat.) 460, 469; bk. 6, L. ed. 693; *Erb v. Great Western R. Co.*, 3 Ont. App. 446.

[*438] *5thly. A shareholder in a joint stock company, who has been induced to purchase his shares by the fraud of the agent of the company, cannot bring an action of deceit against the company, so long as he is a member of it.³]

§ 579. [In several cases, where shareholders in a company have endeavored to render the directors of the company liable for false and fraudulent representations contained in prospectuses or other documents, it has become necessary to consider the relationship existing between the directors and the persons who have actually committed the fraud. In *Peek v. Gurney*,¹ where the action was brought by a shareholder against the directors of Overend, Gurney & Co., for false and fraudulent representations contained in the prospectus of the company intended to carry on the business of the firm of Overend & Gurney, it was attempted on behalf of Barclay, one of the defendant directors, to relieve him from liability on the ground that he had taken no part in, and given no express authority for the preparation and publication of the fraudulent prospectus which, in fact, he had never read until after the company had stopped payment. But this defence was held unavailing, and Lord Chelmsford, in moving the judgment of the House of Lords, said (at p. 392), "The short answer to this defence is, that he was acquainted with all that the other directors knew; he consented to become a director, knowing that a prospectus would, as a matter of course, be issued: he signed the memorandum and articles of association referred to in the prospectus; and, upon receipt of the prospectus, he filled up and signed the form of application for shares, printed with and forming part of the prospectus. Can he, upon these facts, be heard to say that he did not authorize the prospectus, or sanction its publication?"

In *Weir v. Bell*,² the defendant directors had been authorized by the company to issue debentures. Afterwards, the

³ *Western Bank of Scotland v. Addie*, L. R. 1 Sc. App. 146; *Houldsworth v. The City of Glasgow Bank* 5 App. Cas. 317.

¹ L. R. 6 H. L. 377.

² 3 Ex. D. 238, C. A.; s. c. *sub nom.* *Weir v. Barnett*, *ibid.* 32.

directors at a board meeting authorized the secretary of *the company to employ a firm of brokers [*439] to place the debentures. The secretary accordingly employed brokers on behalf of the company, who, without any express authority from the directors, issued a prospectus containing false and fraudulent statements, on the faith of which the plaintiff purchased debentures which proved to be worthless.

The action was brought against several of the directors in the first instance, and the judgment of the Exchequer Division was in favor of them all, proceeding upon the ground that the brokers were the agents of the company, and not of the directors, and disregarding the finding of the jury upon this head as contrary to the evidence. The plaintiff appealed only against the judgment in favor of defendant Bell. It was held by the majority of the Court of Appeal, consisting of Cockburn C. J., Bramwell and Brett L.JJ., that, on the facts disclosed, the defendant was not liable.

Cockburn C. J. based his judgment, which received the concurrence of Brett L. J. on the ground that the defendant Bell, although a party as director to the receipt of the money paid for the debentures, was not aware of the falsity of the statements contained in the prospectus, and derived no personal benefit from the money so received.³

Bramwell L. J. based his judgment on the ground that the defendant Bell had been guilty of no moral fraud, and not being the principal of the brokers, could not be held to have impliedly undertaken for the absence of fraud in them in issuing the prospectus.

Cotton L. J., on the other hand, delivered a powerful dissentient judgment, holding that the finding of the jury, that the brokers were the agents of the directors, was warranted by the evidence, that the brokers in preparing and issuing the prospectus discharged a part of the duty entrusted to

³ At p. 249 of the report, Cockburn C. J. intimates that he would have held the defendant liable if, after knowledge of the fraud, he had derived benefit from it. This was

one of the questions left open by the Judicial Committee of the Privy Council in *Mackay v. The Commercial Bank of New Brunswick*, ante, p. 435.

the defendant as one of the directors by the resolution authorizing the issue of debentures, and that it was the [*440] defendant's *duty as *director* to ascertain whether the statements in the prospectus were true or false; and he referred to the passage above cited from Lord Chelmsford's judgment in *Peek v. Gurney*, as confirming this view.

§ 580. And in *Cargill v. Bower*,¹ Fry J. following the decision of the Exchequer Division in *Weir v. Bell*, in which the Court of Appeal had not then delivered their judgment, held that a director of a company is not liable for a fraud committed by his co-directors, or by any other agent of the company, "unless he has either expressly authorized, or tacitly permitted its commission;" and he reconciled this decision with the principle applied by the House of Lords to Barclay's case in *Peek v. Gurney*, on the ground that Barclay must be considered to have there impliedly authorized the commission of the fraud, inasmuch as he had given authority to his co-directors to issue a prospectus, although from his knowledge of the affairs of the firm of Overend & Gurney, he must have been aware that any prospectus would necessarily be fraudulent.²]

§ 581. It must not be concluded from this review of the authorities that the purchaser who has been induced by false representations to make the contract, is always without remedy because the vendor believed the statements to be true, and was innocent of any fraudulent intent. These

¹ 10 Ch. D. 502.

² *Fraudulent representations*—*What constitutes*.—It would seem that in order to maintain an action for fraud founded upon representations made by the defendant, or his agent, that it must be made to appear that he believed, or had reason to believe, at the time he made them, that the representations were false or without knowledge, he assumed, or intended to convey the impression that he had actual knowledge, of their truth, and that the plaintiff relied upon them to his injury. *Wakeman*

v. Dalley, 51 N. Y. 27; s. c. 10 Am. Rep. 551. Where the director of a corporation knowingly issues or sanctions the circulation of a prospectus containing false statements of immaterial facts, the natural tendency of which is to deceive and to induce the public to purchase the corporate stock, is liable for the damages sustained by one who, relying upon such representations, is induced to make a purchase. *Morgan v. Skiddy*, 62 N. Y. 319. See *Wilcox v. Henderson*, 64 Ala. 535.

cases only establish that the vendor has committed no *wrong*, and is therefore not liable in an action of *deceit*, or any other action founded on *tort*. But, in very many instances, a representation made by the vendor amounts in law to a *warranty*, and when this is the case, the purchaser has remedies on the *contract*, for breach of the warranty. The rules of law by which to determine when a representation is a warranty, and what are the rights of the buyer for a breach of this warranty, when the representation is false, are treated *post*, Book IV., Part 2, Ch. 1, on *Warranty*. The law as to the effect of innocent misrepresentation of law or of fact, has been discussed, *ante*, p. 376.¹

§ 582. *The case of *Feret v. Hill*¹ has been [*441] omitted in the foregoing review, in order not to interrupt the exposition of the point directly under discussion, but the case well deserves consideration. It was in its facts the converse of *Cornfoot v. Fowke*. The defendant Hill was the owner of a tenement, and the plaintiff sent an agent to him to give assurances of the plaintiff's good character and reputation, in order to induce the defendant to let the premises to the plaintiff. The agent was innocent, and was honest in his assurances of the plaintiff's good character, but in point of fact the plaintiff, who pretended that he wanted the premises for carrying on business as a perfumer, intended to convert them into a brothel. The plaintiff was let into possession and used the premises as a brothel, and the defendant discovering the fraud practised on him, ejected

¹ *Representation which amounts to a warranty* will render the party making it liable where it is false and is relied upon by the other party to the contract. *Wilcox v. Henderson*, 64 Ala. 335; *Bower v. Fenn*, 90 Pa. St. 359, 362; s. c. 85 Am. Rep. 652; *Weimer v. Clement*, 37 Pa. St. 147; s. c. 78 Am. Dec. 411; *Jackson v. Wetherill*, 7 Serg. & R. (Pa.) 122; *McFarland v. Newman*, 9 Watts (Pa.) 55; s. c. 84 Am. Dec. 497; *Fisher v. Worrall*, 5 Watts & S. (Pa.) 478. However, it is held in *DaLee v. Blackburn*, 11

Kans. 190, that where the contract of sale is allowed to remain in full force and each party retains all that he received under and by virtue of it, the vendor is liable to the vendee in an action at law, for damages only where the statements are made fraudulently, and that he is not liable where they are made innocently, honestly, and in good faith.

¹ 15 C. B. 207; 23 L. J. C. P. 183. Commented on and distinguished in *Milliken v. Thorndike*, 103 Mass. 382, 386.

the plaintiff forcibly from the apartments, after having given him a notice to quit, which he disregarded. The plaintiff then brought ejectment to recover possession of the apartments, and the jury found, first, that the plaintiff, at the time he entered into the agreement, intended to use the premises for a brothel; and secondly, that he had induced the defendant to enter into the agreement *by fraudulent misrepresentation as to his character, and as to the purpose for which he wanted the premises*. The verdict was for the defendant, and Crowder J. reserved leave to the plaintiff to move to enter the verdict in his favor, if the Court should be of opinion that the agreement, notwithstanding this finding, was valid. The motion prevailed, and the plaintiff was held entitled to enforce the agreement, on the ground that the misrepresentation was of a fact *collateral to the agreement*, Jervis C. J. saying that there was no misrepresentation "as to the legal effect of the instrument which he (the defendant) executed, nor as to what he was doing, or that he was doing one thing, when in fact he was doing another." The other judges, also, put the case upon the ground that the Court was not called on to enforce any agreement at all, but to [*442] replace premises in the possession of *a man who had an executed legal title to the possession: that it was impossible to say that nothing passed under the demise, simply because it was obtained by fraudulent misrepresentation.

The effect of this decision seems to be, that a defrauded lessor, who has actually executed a demise, cannot treat it as a nullity, but must proceed to have it rescinded on the ground of the fraud by an appropriate tribunal, before treating it as non-existent: such appropriate tribunal not being a court of law, but one of equity.

[And now, under the Judicature Acts, when such relief is sought by the plaintiff, the Chancery Division of the High Court is the appropriate tribunal, Judicature Act, 1873, s. 34, subs. 3, *ante*, p. 370.]

§ 583. In further illustration of the effect of fraudulent representations to the prejudice of the purchaser, the reader

is referred to the series of decisions rendered in cases where shareholders in companies have attempted to relieve themselves from responsibility by showing that they had been induced to take the shares through fraudulent representations of the directors. These cases are all reviewed in *Oakes v. Turquand*,¹ decided in the House of Lords in August, 1867, in which it was settled that such contracts are voidable only, not void, and that the defrauded shareholders cannot relieve themselves from responsibility to creditors, by disaffirming the contract after the company has failed, and has been ordered to be liquidated in Chancery, [and the same principle applies to a voluntary winding up.²]

§ 584. [By 30 & 31 Vict. c. 131, s. 38 (Companies Act, 1867), it is enacted, that "every prospectus of a company and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of *such prospectus or notice, whether [*443] subject to adoption by the directors, or the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract." ¹

¹ L. R. 2 H. L. 325. See, also, *Tennent v. The City of Glasgow Bank*, 4 App. Cas. 615, and *Houldsworth v. The City of Glasgow Bank*, 5 App. Cas. 317, *ante*, p. 435; and *Burgess' case*, 49 L. J. C. H. 541.

² *Stone v. City and County Bank*, 3 C. P. D. 282, C. A. See, also, *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. (2 Stew.) 190; *Scovill v. Thayer*, 105 U. S. (15 Otto) 143, 149; bk. 26, L. ed. 968; *County of Morgan v. Allen*, 103 U. S. (13 Otto) 498, 509; bk. 26, L. ed. 498; *Hawley v. Upton*, 192 U. S. (12 Otto) 314; bk. 26, L. ed. 176; *Pullman v. Upton*,

96 U. S. (6 Otto) 328; bk. 24, L. ed. 818; *Chubb v. Upton*, 95 U. S. (5 Otto) 667; bk. 24, L. ed. 524; *Upton v. Tribilcock*, 91 U. S. (1 Otto) 45; bk. 23, L. ed. 523; *Ogilvie v. Knox Ins. Co.*, 63 U. S. (22 How.) 380; bk. 16, L. ed. 349; *Thompson on Liability of Stockholders*, sec. 142.

¹ *Cornell v. Hay*, L. R. 8 C. P. 328; *Askew's case*, 22 W. R. 762; *Charlton v. Hay*, 81 L. T. N. S. 437; 23 W. R. 129; *Gover's Case*, 1 Ch. D. 182, C. A.; *Craig v. Phillips*, 3 Ch. D. 722; *Phosphate Sewage Co. v. Hartmont*, 5 Ch. D. 394, C. A.; *New Sombrero Co. v. Erlanger*, 5 Ch.

It would be beyond the scope of this work to examine all the cases which have been decided on the question what contracts must be set out under this section, as to which there has been a great divergence of opinion. The reader is referred to the note on this section in Mr. Buckley's work on the Companies Acts, 3d ed. p. 455.]

§ 585. It would be an onerous and scarcely useful task to enumerate the various devices which, in adjudicated cases, have been held by the courts to be frauds on purchasers. The principles stated in this chapter have been illustrated in numerous decisions.¹ Some of those which have most frequently occurred in practice will be presented as examples.

In *Bexwell v. Christie*,² it was held to be fraudulent in the vendor to bid by himself or agents at an auction sale of his own goods, where the published conditions were "that the highest bidder shall be the purchaser, and if a dispute arise, to be decided by a majority of the persons present." Lord Mansfield, also, in that case held it to be a fraud on the public, and therefore on the buyer, for the vendor falsely to describe his goods offered at auction as "the goods of a gentleman deceased, and sold by order of his executor."

[*444] * The foregoing case was highly eulogized, and followed by Lord Kenyon and the King's Bench in *Howard v. Castle*;³ and the employment of "puffers" as they are termed, that is, persons engaged to bid in behalf of the vendor in order to force up the price against the public, has ever since been held fraudulent.

D. 78, C. A.; 3 App. Cas. 1218; *Bagnall v. Carlton*, 6 Ch. D. 130; s. c. in C. A. 6 Ch. D. 371; *Twycross v. Grant*, 2 C. P. D. 469, C. A.; *Sullivan v. Mitcalfe*, 5 C. P. D. 455, C. A.; *Arkwright v. Newbold*, 17 Ch. D. 301, C. A.

¹ *Early v. Garret*, 9 B. & C. 928; *Duke of Norfolk v. Worthy*, 1 Camp. 340; *Hill v. Gray*, 1 Stark. 434; *Jones v. Bowden*, 4 Taunt. 847; *Barber v. Morris*, 1 Mood. & R. 62; *Tapp v. Lee*, 3 B. & P. 367; *Corbett v. Brown*, 8 Bing. 33; *Hill v. Perrott*,

3 Taunt. 274; *Abbotts v. Barry*, 2 B. & B. 369.

² 1 Cowp. 395.

³ 6 T. R. 642. See, also, *Wheeler v. Collier*, 1 M. & W. 123; *Crowder v. Austin*, 3 Bing. 368; *Rex v. Marsh*, 3 Y. & J. 331; *Thornett v. Haines*, 15 M. & W. 367; *Green v. Baverstock*, 14 C. B. N. S. 204, and 32 L. J. C. P. 180. See, also, *Darst v. Thomas*, 87 Ill. 221; *Latham v. Morrow*, 6 B. Mon. (Ky.) 630; *Baham v. Bach*, 13 La. 287; s. c. 23 Am. Dec. 561; *Moncrieff v. Goldsborough*, 4 Har. & McH. (Md.)

§ 586. In the case of *Warlow v. Harrison*, decided in Queen's Bench,¹ and afterwards in the Exchequer Chamber,² the law on the subject of the auctioneer's responsibility in such cases was examined on the following state of facts:— The defendant was an auctioneer, having a horse repository, and they advertised for sale a mare, "the property of a gentleman, *without reserve*." The plaintiff attended the sale, and bid 60 guineas, and another person bid 61 guineas. The plaintiff, being informed that this last person was the owner, declined to bid further, and the horse was knocked down to the owner as purchaser at 61 guineas. The plaintiff at once informed the defendant and the owner that he claimed the mare as the highest *bonâ fide* bidder, the sale having been advertised "without reserve." The owner refused to let him have the mare, and he thereupon tendered to the defendant, the auctioneer, 60 guineas in gold, and demanded the mare. The plaintiff had notice of the conditions of the sale, among which were the following:— "*First*. The highest bidder to be the buyer, and if any dispute arise between two or more bidders before the lot is returned into the stables, the lot so disputed shall be put up again, or the auctioneer may declare the purchaser. *Third*. The purchaser being declared, must immediately give in his name and address, with, if required, a deposit of 5s. in the pound on account of his purchase, and pay the remainder before such lot is delivered. *Eighth*. Any lot ordered for this sale and sold by private contract by the owner, or *advertised [*445] 'without reserve,' and bought by the owner, to be

282; s. c. 1 Am. Dec. 407; *Lee v. Lee*, 19 Mo. 420; *Towle v. Leavitt*, 23 N. H. 360; *Conover v. Walling*, 15 N. J. Eq. (2 McCart.) 173; *Trust v. Delaplaine*, 3 E. D. Smith, (N. Y.) 219; *Wolfe v. Luyster*, 1 Hall (N. Y.) 146; *Fisher v. Hersey*, 17 Hun (N. Y.) 370; *National Fire Ins. Co. v. Loomis*, 11 Paige Ch. (N. Y.) 431; *Woods v. Hall*, 1 Dev. (N. C.) Eq. 411; *McDowell v. Simms*, 6 Ired. (N. C.) Eq. 278; *Yerkes v. Wilson*, 81 Pa. St. 9; *Backenstoss v. Stahler*, 33 Pa.

St. 251; s. c. 75 Am. Dec. 592; *Staines v. Shore* 16 Pa. St. 200; s. c. 55 Am. Dec. 492; *Donaldson v. McRoy*, 1 Browne (Pa.), 346; *Veazie v. Williams*, 3 Story C. C. 611; s. c. 49 U. S. (8 How.) 134; bk. 12, L. ed. 1018; *Dimmock v. Hallett*, L. R. 2 Ch. App. 21, 29; *Gilliat v. Gilliat*, L. R. 9 Eq. 60; *Chimlain v. Bellow*, 1 Ir. R. 1 Eq. 289; 2 Kent Com. 537, 539; 1 Story Eq. Jur. sec. 293.

¹ 28 L. J. Q. B. 18.

² 1 E. & E. 295; 29 L. J. Q. B. 14.

liable to the usual commission of 2l. per cent.” As the judgment of the Exchequer Chamber turned much upon the pleadings, it is necessary to state that the plaintiff’s declaration, after alleging the advertisement for sale without reserve, went on to aver that he attended the sale and *became the highest bidder*, “and thereupon and thereby *the defendant became and was the agent of the plaintiff to complete the contract*; and then charged a breach of the defendant’s duty, to the plaintiff *as the plaintiff’s agent* in failing to complete the contract in behalf of the plaintiff. The defendant pleaded: First, not guilty. Secondly, that the plaintiff was not the highest bidder. Thirdly, that the defendant did not become the plaintiff’s agent as alleged.

In the plaintiff’s argument the following civil law authorities were cited: Cicero de Officiis, lib. 3, s. 15, “Tollendum est igitur ex rebus contrahendis omne mendacium; non licitorem venditor, nec qui contra se liceatur,⁸ emptor apponet:” and Huberus, lib. 18, tit. 2, s. 7, Prælectiones: “Sed hoc facile constabit, si venditor falsum emptorem inde ab initio subornet, qui plus aliis offerat, ut veris emptoribus præmium maximæ licitationis, vulgo, stryckgelt, quo nihil usitatus, intercipiat, dolo detecto, venditorem teneri ad præmium vero licitatori maximo præstandum, quia hoc est contra fidem conventionis perfectæ quâ statutum est ut maximo licitatori præmium daretur.”

§ 587. Lord Campbell C. J. delivering the unanimous judgment of the Queen’s Bench, holding:

First. — That it was not true in point of law that the auctioneer is the agent of the purchaser until the acceptance of his bid as being the highest, which acceptance is shown by knocking down the hammer; and that till then the auctioneer is exclusively the agent of the vendor.

Secondly. — That both parties may retract till the hammer is knocked down: that no contract takes place between

⁸ The better reading is, qui contra relicatur, “a person to bid back” or lower than some one has already bid, in order to produce the impres-

sion that the property is not worth what has been offered for it. The reading se liceatur is condemned by Zumpt.

them *till that is done; and that the auctioneer [*446] cannot be bound when both the vendor and bidder remain free.

The learned Chief Justice then said in the name of the Court:

Thirdly. — “We are clear that the bidder has no remedy against the auctioneer, whose authority to accept the offer of the bidder has been determined by the vendor before the hammer has been knocked down.”

§ 588. Although this judgment of the Queen's Bench was not reversed in the Exchequer Chamber, because approved on the pleadings as they stood, the third proposition above quoted was not affirmed, and the Court of Error gave leave to the plaintiff to amend, so as to enforce a liability against the auctioneer. The Exchequer Chamber, composed of Martin, Bramwell, and Watson, BB. and Willes and Byles, JJ. were unanimous in holding the auctioneer liable, and in giving leave to amend; but Willes J. and Bramwell B. without dissenting from the opinion of the majority, as delivered by Martin B. preferred putting their judgment on a different ground, on which they felt themselves more clearly justified in their conclusions. Martin B. first declared that the judgment of the Queen's Bench was right upon the pleadings, but the Court of Appeal being now vested with power to amend, and the object of the law being to determine the real question in controversy, the power ought to be “largely exercised” for that purpose; and that upon the facts the plaintiff was entitled to recover.

§ 589. The learned Baron then proceeded as follows: “In a sale by auction there are three parties, namely, the owner of the property to be sold, the auctioneer, and the portion of the public who attend to bid, which of course includes the highest bidder. In this, as in most cases of sales by auction, the owner's name was not disclosed: he was a concealed principal. The names of the auctioneers, of whom the defendant was one, alone were published, and the sale was announced by them to be ‘*without reserve.*’ This, according to all the cases both at law and in equity, means that neither

the vendor nor any person on his behalf may bid at [*447] the auction, and that *the property shall be sold to the highest bidder, whether the sum bid be equivalent to the real value or not. For this position, see the case of *Thornett v. Haines*, 15 M. & W. 367. We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition from the case of the loser of property offering a reward; or that of a railway company publishing a time-table, stating the times when and the places at which the trains run. It has been decided that the person giving the information advertised for, or a passenger taking a ticket, may sue as upon a contract with him. *Denton v. The Great Northern Railway Company*, 5 E. & B. 860, 25 L. J. Q. B. 129. Upon the same principle it seems to us, *that the highest bonâ fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve.* We think that the auctioneer who puts property up for sale upon such a condition, pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so, and that *this contract is made with the highest bonâ fide bidder, and in case of a breach of it, he has a right of action against the auctioneer.* . . . We entertain no doubt that the owner may at any time before the contract is legally complete, interfere and revoke the auctioneer's authority, but he does so at his peril; and if the auctioneer has contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he is entitled to be indemnified."

§ 590. In reference to the conditions of the sale, the learned Baron further said, as to the first condition, that the owner could not be the buyer, and the auctioneer ought to have refused his bid, giving for a reason, that the sale was without reserve; and that the Court were inclined to differ with the Queen's Bench, and to consider that the owner's bid was not a revocation of the auctioneer's authority. The *eighth* condition was construed as providing simply that if the owner acted contrary to the conditions of the sale, he must pay the usual commissions. The Court was therefore

ready to give judgment for the plaintiff if he chose to amend his declaration.

Willes J. and Bramwell B. preferred putting their *assent to the judgment on the grounds that the [*448] facts furnished strong evidence to show that the auctioneer had received no authority from the owner to advertise a sale "without reserve"; and that the plaintiff ought to be allowed to amend by adding a count, alleging an undertaking by the auctioneer that he had such authority, and a breach of that undertaking.

§ 591. It was said at one time that the rule in equity differs from that at common law on the subject of puffers to this extent; that in equity it is allowable to employ one puffer, but no more, for the purpose only of preventing the property from being sold below a limit fixed by the vendor. Willes J. in *Green v. Baverstock*,¹ however, expressed the opinion that the rule in equity was confined to sales under the order of the Court, in conformity with "an inveterate practice." But the existence of any such rule in equity appears to have been still a moot point, even in 1865, as is shown in the opinion of Lord Cranworth in *Mortimer v. Bell*.² By the new Act, however, 30 & 31 Vict. c. 48, passed at the instance of Lord St. Leonards (but applicable only to sale of land), it is provided in the fourth section, that

¹ 14 C. B. N. S. 204; 32 L. J. C. P. 180.

² 1 Ch. 10.

The owner may employ a bidder to prevent sacrifice of his property under a given price, it seems, where he is employed *bonâ fide* to prevent a sacrifice of the property; but where he is employed to enhance the price by the pretended competition, it will be a fraud upon the purchasers, being a mere artifice in combination to mislead the judgment and inflame the zeal of the bidders. See *Latham v. Morrow*, 6 B. Mon. (Ky.) 630; *Baham v. Bach*, 13 La. 287; s. c. 23 Am. Dec. 561; *Moncrieff v. Goldsborough*, 4 Har. & McH. (Md.) 282;

s. c. 1 Am. Dec. 407; *Phippen v. Stickney*, 44 Mass. (3 Metc.) 387; *Lee v. Lee*, 19 Mo. 420; *Wolfe v. Luyster*, 1 Hall (N. Y.) 146; *National Fire Ins. Co. v. Loomis*, 11 Paige Ch. (N. Y.) 431; *Morehead v. Hunt*, 1 Dev. (N. C.) Eq. 35; *Woods v. Hall*, 1 Dev. (N. C.) Eq. 411; *Troughton v. Johnston*, 2 Hayw. (N. C.) 328; *Tomlinson v. Savage*, 6 Ired. (N. C.) Eq. 430; *Walsh v. Barton*, 24 Ohio St. 28; *Pennock's Appeal*, 14 Pa. St. 446; *Steele v. Ellmaker*, 11 Serg. & R. (Pa.) 86; *Jenkins v. Hogg*, 2 Tread. (S. C. Const.) 821; *Reynolds v. Dechaums*, 24 Tex. 174; *Veazie v. Williams*, 3 Story C. C. 622, 623.

“whereas there is at present a conflict between her Majesty’s courts of law and equity in respect of the validity of sales by auction of land where a puffer has bid, although no right of bidding on behalf of the owner was reserved, the courts of law holding that all such sales are absolutely illegal, and the courts of equity under some circumstances giving effect to them, but even in courts of equity the rule is unsettled: and whereas it is expedient that an end should be put to such conflicting and unsettled opinions: Be it therefore enacted, that from and after the passing of this Act, whenever a sale by auction of land would be invalid at law by reason of the employment of a puffer, the same shall be deemed invalid in equity as well as at law.”

§ 592. The statute further directs that where land is stated to be sold without reserve, it shall not be [*449] lawful for the seller to *bid, or the auctioneer to accept, a bid from him or any one employed by him; and where the sale is subject to the right of a seller to bid, it shall be lawful for the seller or any *one* person in his behalf to bid.¹

The act also forbids the courts of equity from continuing the practice of opening biddings in sales made under their orders; so that in future the highest *bonâ fide* bidder at such sales shall be the purchaser, in the absence of fraud or improper conduct in the management of the sale.

In a case,² just before the passing of this Act, it was announced that the sale was “without reserve,” *and* that the parties interested had liberty to bid. It was held by Lords Justices Turner and Cairns that on these terms, a purchaser was bound by his bid for 19,000*l.*, the only bids higher than 14,000*l.* having been made by the purchaser and a mortgagee in possession of the estate.

§ 593. In *The Queen v. Kenrick*,¹ the fraud on the purchaser, for which the defendant was convicted as being guilty of false pretences, was telling the buyer that the horses offered for sale had been the property of a lady de-

¹ See *Gilliat v. Gilliat*, 9 Eq. 60, as to the construction of this clause.

² *Dimmock v. Hallett*, 2 Ch. 21.

¹ 5 Q. B. 49.

ceased, were then the property of her sister, and never had been the property of a horse-dealer, and that they were quiet and tractable; all these statements being false, and the vendor knowing that nothing but a belief in their truth would induce the buyer to make the purchase.

§ 594. In *Dobell v. Stevens*,¹ the fraud consisted in falsely telling the buyer that the receipts of a public-house were 160*l.* per month, and the quantity of porter sold seven butts per month, and that the tap was let for 82*l.* per annum, and two rooms for 27*l.* per annum, whereby the

¹ 3 B. & C. 623. See, also, *Boyn-ton v. Hazelboom*, 96 Mass. (14 Allen) 107; *Dobell v. Stevens*, 3 Barn. & Cres. 623; *Pilmore v. Hood*, 5 Bing. N. R. 97; s. c. 1 Arnold, 390; 6 Scott, 827; 7 D. (P. C.) 136; *Bowring v. Stevens*, 2 Car. & P. 337; *Dobell v. Stevens*, 5 Dowl. & Ry. 490; *Pearson v. Wheeler*, R. & Moo. 303; *Hutchinson v. Morley*, 7 Scott, 341. See *Newell v. Horn*, 45 N. H. 421; *Peaslee v. Gee*, 19 N. H. 279; *Sargent v. Cutterson*, 13 N. H. 473; *Clark v. Baird*, 9 N. Y. 183; *Whitney v. Allaire*, 1 N. Y. 305; s. c. 4 Den. (N. Y.) 554; *Ward v. Wiman*, 17 Wend. (N. Y.) 193; *Harlow v. Green*, 34 Vt. 379.

As to the effects of a material mistake of the facts of the contract, see *Richmond v. Gray*, 85 Mass. (3 Allen) 25; *Old Colony R. R. v. Evars*, 72 Mass. (6 Gray) 25, 36; s. c. 66 Am. Dec. 394; *Western R. R. v. Babcock*, 44 Mass. (6 Metc.) 346, 352.

A misrepresentation of a material fact not within the observation of the opposite party, which is known by the party making it at the time to be untrue, and made for the purpose of inducing a purchase, is fraudulent and will avoid the sale. *Brown v. Castles*, 65 Mass. (11 Cush.) 348; *Medbury v. Watson*, 47 Mass. (6 Metc.) 246; s. c. 39 Am. Dec. 726; *Lobdell v. Baker*, 44 Mass. (3 Metc.) 201; s. c. 35 Am. Dec. 358; *Newell v.*

Horn, 45 N. H. 421; *Page v. Parker*, 40 N. H. 69; s. c. 43 N. H. 369; 80 Am. Dec. 172; *Whitney v. Allaire*, 1 N. Y. 305; *Monell v. Colden*, 13 Johns. (N. Y.) 395; *Wardell v. Fosdick*, 13 Johns. (N. Y.) 325; s. c. 7 Am. Dec. 390; *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Polhill v. Walter*, 8 Barn. & Ad. 114; *Dobell v. Stevens*, 3 Barn. & C. 623; *Langridge v. Levy*, Murph. & H. 139; s. c. 2 Mees. & W. 531; 7 D. (P. C.) 27; s. c. affirmed 2 Horn. & Hurlst. 325; 4 Mees. & W. 337; *Small v. Attwood*, Young, 461; *Watson v. Poulson*, 15 Jur. 111; s. c. 7 Eng. L. & Eq. 588.

"Trade statements" or "banter." — This rule, however, does not apply to mere "trade statements" concerning the value of the thing sold from offers for it and the like; neither will it apply in those cases where the party damaged by false affirmation made by the vendor, when by vigilance and attention the vendor might have ascertained that the statement upon which he acted was false. *Brown v. Castles*, 65 Mass. (11 Cush.) 348. See *Moore v. Tubeville*, 2 Bibb (Ky.) 602; s. c. 6 Am. Dec. 642; *Starr v. Bennett*, 5 Hill (N. Y.) 303; *Saunders v. Hatterman*, 2 Ired. (N. C.) L. 32; s. c. 37 Am. Dec. 404; *Lytle v. Bird*, 3 Jones (N. C.) L. 222; *Baily v. Merrell*, 3 Bulst. 94; *Vernon v. Keyes*, 4 Taunt. 494; s. c. 12 East, 632; *Harvey v. Young*, Yelv. 21.

plaintiff was induced to buy; and similar deceits were employed in *Lysney v. Selby*,² and *Fuller v. Wilson*.³

§ 595. In *Schneider v. Heath*,¹ a vessel was sold, "hull, masts, yards, standing and running rigging, *with all* [*450] *faults*,² as they *now lie." There was, however, a false statement, that "the hull was nearly as good as when launched," and means were taken to conceal the defects that the vendor knew to exist. This was held by Sir James Mansfield to be a fraud on the purchaser; but in *Baglehole v. Walters*,³ Lord Ellenborough was decided in his rejection of the purchaser's attempt to repudiate the sale of a vessel under exactly the same description, "with all faults," where the seller, although knowing the latent defects, used no means for concealing them from the purchaser. In this decision, Lord Ellenborough expressly overruled *Mellish v. Motteux*,⁴ and in *Pickering v. Dowson*,⁵ the Common Pleas followed Lord Ellenborough's decision, as one "never questioned at the bar;" and concurred in overruling *Mellish v. Motteux*.

Baglehole v. Walters was also followed by the King's Bench in deciding *Bywater v. Richardson*,⁶ in 1834.

§ 596. In *Horsfall v. Thomas*,¹ the defence to an action on a bill of exchange was that the buyer had been defrauded in the purchase of a steel gun, for which the bill

² 2 Lord Raymond, 1118.

³ 3 Q. B. 58. See, also, *Nelson v. Wood*, 62 Ala. 175; *Cruess v. Fessler*, 39 Cal. 336; *Mather v. Robinson*, 47 Iowa, 403; *Hale v. Philbrick*, 47 Iowa, 217; *Crosland v. Hall*, 33 N. J. Eq. (6 Stew.) 111; *Bower v. Fenn*, 90 Pa. St. 359; s. c. 35 Am. Rep. 662.

¹ 3 Campb. 506.

² See *Whitney v. Boardman*, 118 Mass. 242, 247; *Gossler v. Eagle Sugar Co.*, 103 Mass. 331; *Henshaw v. Robbins*, 50 Mass. (9 Metc.) 83, 90; s. c. 43 Am. Dec. 367; *Boardman v. Spooner*, 95 Mass. (13 Allen) 353, 359; *Hanson v. Edgerly*, 29 N. H. 343, 353; *Pearce v. Blackwell*, 12

Ired. (N. C.) L. 49, 61; *Smith v. Andrews*, 8 *Ired. (N. C.) L.* 6; *Schneider v. Heath*, 3 Campb. 506; *Shepherd v. Kain*, 5 Barn. & Ald. 240.

³ 3 Camp. 154.

⁴ Peake, 115.

⁵ 4 Taunt. 779.

⁶ 1 A. & E. 508. See, also, *Freeman v. Baker*, 5 B. & Ad. 797; *Ward v. Hobbs*, 4 App. Cas. 13; s. c. 3 Q. B. D. 150, C. A., overruling 2 Q. B. D. 331.

¹ 1 H. & C. 90, and 31 L. J. Ex. 322.

As to failure to point out defects, see *Toole v. Davenport*, 63 Ga. 160; *Howell v. Biddlecom*, 62 Barb (N. Y.) 131.

was given. The gun was made by defendant's order, and he was informed when it was ready, but made no examination of it, and sent the bill of exchange in part payment. There was a defect in the gun, and a metal plug was inserted, which would have concealed the defect from any person inspecting the gun. It was received by the defendant, fired several times, answered the purpose as long as it was entire, but afterwards burst in consequence of the defect. Held, *that the defendant had not been influenced in his acceptance of the gun by the artifice used, for he had never examined it*: that the mere statement by the plaintiffs to the defendant that the gun was ready for him, even if they knew the existence of a defect which would make the gun worthless, and failed to inform of it, was not a fraud. The learned judge, Bramwell B. who delivered the judgment of the Court, *said that "fraud must be committed by the affirmance of something not true within the knowledge of the affirmant, or by the suppression of something which is true and which it is the duty of the party to make known." In the case before the Court there was no affirmance; and there was no duty on the part of the maker to point out a defect where the buyer has an opportunity for inspection and does not choose to avail himself of it.²

This decision is questioned and disapproved by Cockburn C. J. in *Smith v. Hughes* (L. R. 6 Q. B. 597), and it certainly seems that the artifice used to conceal the defect comes within the definition usually given of fraud.

§ 597. The case of *Hill v. Gray*,¹ decided by Lord Ellenborough at Nisi Prius in 1816, would seem to conflict with the general rule in relation to concealment. The facts were that the agent employed by plaintiff to sell a picture was pressed by the defendant to tell him whose property it was: the agent refused. The same agent was at the time selling also pictures for Sir Felix Agar, and the defendant, "misled

² See *Keates v. Earl Cadogan*, 10 C. B. 591, and 20 L. J. C. P. 76; also, *Hill v. Gray*, 1 Stark. 434.

¹ 1 Stark. 434.

by circumstances, erroneously supposed" that the picture in question also belonged to Sir Felix Agar, and under this misapprehension bought it. The agent "knew that the defendant labored under this delusion, but did not remove it." The price was 1000*l.*, the picture being said to be a Claude, and proof was offered that it was genuine, and that after the defendant knew that it was not one of Sir Felix Agar's pictures he had objected to paying on the ground that it was not genuine, but not on the ground of any deception. Lord Ellenborough said: "Although it was the finest picture that Claude ever painted, it must not be sold under a deception. The agent ought to have cautiously adhered to his original stipulation, that he should not communicate the name of the proprietor, and *not to have let in a suspicion on the part of the purchaser which he knew enhanced the price.*

He saw that the defendant had fallen into a delusion [*452] in supposing the picture to be Sir Felix * Agar's, and yet he did not remove it. . . . This case has arrived at its termination, since it appears that the purchaser labored under a deception, in which the agent permitted him to remain, on a point *which he thought material to influence his judgment.*" This judgment, on a first perusal, seems certainly not reconcilable with the received principles on the subject, but in *Keates v. Earl Cadogan*,² the case was explained by the Common Pleas by construing the language of Lord Ellenborough in the italicized passages as intimating that there "had been a positive aggressive deceit." It is, indeed, quite possible that it was the *act* of the agent in putting the picture with those of Sir Felix Agar that created the belief, which the agent perceived, and did not remove.

§ 598. In the earlier case of *Jones v. Bowden*,¹ an action upon the case for deceit in a sale was maintained under the following circumstances:—The defendant bought pimento at an auction sale, as sea-damaged. *It is usual in such sales*

² 10 C. B. 591, at p. 600; 20 L. J. C. P. 76. And see *per* Lord Chelmsford in *Peck v. Gurney*, L. R. 6 H. L. at p. 390, who doubts whether the mere silence of the agent

could be so interpreted, but attributes the explanation to the anxiety of the Court to reconcile the case with established principles.

¹ 4 Taunt. 847.

of this article to declare it to be sea-damaged, and when nothing is said, it is supposed to be sound. Defendant then repacked it, and it was included in a catalogue of the auction sale, as "187 bags pimento, bonded," and at the foot was stated, "the goods to be seen as specified in the catalogue, and remainder at No. 36, Camomile Street." Defendant drew fair samples, which were exhibited to the bidders, by which the article appeared to be dusty, and of inferior quality; but no one could tell from the samples that the goods had been sea-damaged or repacked, either of which facts depreciates the value in the market. The catalogues were not distributed till the day before the sale, and no one had inspected the goods. The auctioneer made no addition nor comment on what was stated in the catalogue, and the plaintiff *became the purchaser at 13*d.* per [*453] pound, which was *not more than a reasonable price, after taking into consideration the fact that it had been sea-damaged and repacked.* The jury said: "That the state of the goods *ought* to have been communicated by the defendant to the plaintiff," and found a verdict for him, subject to the point whether the action was maintainable. A rule to set aside the verdict was discharged. The grounds are not very intelligently given, but it may be fairly inferred from the language of Mansfield C. J. that he considered the verdict of the jury as establishing a usage which imposed on the vendor the duty of disclosing the defect, thus bringing the case within the general principle stated by Bramwell J. in *Horsfall v. Thomas*.²

§ 599. In *Smith v. Hughes*,¹ the action was by the plaintiff, a farmer, to recover the price of certain oats sold to the defendant, an owner and trainer of race-horses. The plaintiff's account of the transaction was that he took a sample of the oats to the defendant and asked if he wished to buy oats, to which the latter answered, "I am always a buyer of good oats." The plaintiff asked thirty-five shillings a quarter,

² 1 H. & C. 90; 31 L. J. Ex. case of *Laidlaw v. Organ*, 15 U. S. 322. See, also, *Parkinson v. Lee*, 2 (2 Wheat.) 178; bk. 4, L. ed. 214; East, 314. before the Supreme Court of the

¹ L. R. 6 Q. B. 597; and see the United States.

and *left the sample* with the defendant, who was to give an answer next day. The defendant wrote to say he would take the oats at thirty-four shillings a quarter, and they were sent to him by the plaintiff. But the defendant's account was that, to the plaintiff's question he answered, "I am always a buyer of good *old* oats:" and that the plaintiff then said, "I have some good *old* oats for sale." There was no difference of testimony as to the other facts; and it was further sworn by the defendant that as soon as he discovered that the oats were new, he sent them back: that trainers use old oats for their horses, and never buy new when they can get old. There was also evidence to the effect that thirty-four shillings a quarter was a very [*454] high price for new oats, more than a *prudent business man would have given, and that old oats were then very scarce.

§ 600. The judge told the jury that the question was whether the word "old" had been used in the bargain as stated by the defendant, and if so the verdict must be for him; but if they thought the word "old" had not been used, then the second question would be "whether the plaintiff believed the defendant to believe or to be under the impression that he was contracting for the purchase of old oats." If so, the verdict would also be for the defendant. The jury found for the defendant. The question for the Queen's Bench was whether the second direction to the jury was right, for they had not answered the questions separately, and it was not possible to say on which of the two grounds they had based their verdict. In testing the second question it was plainly necessary to assume that the word "old" had not been used, and on that assumption the Court ordered a new trial.

Cockburn C. J. said, that assuming the vendor to know that the buyer believed the oats to be old oats, but that he had done nothing directly or indirectly to bring about that belief, but simply offered his oats and exhibited his sample, the passive acquiescence of the vendor in the *self-deception* of the buyer did not entitle the latter to rescind the sale.

Blackburn J. concurred, saying that "whatever may be the case in a court of morals, there is no legal obligation on the vendor to inform the purchaser that he is under a mistake, not induced by the act of the vendor." The learned judge further doubted whether the jury had been made to understand the difference between agreeing to take the oats under the belief that they were old (for in that case there would be no defence), and agreeing to take the oats under the belief that the plaintiff *contracted* that they were old, for in this case the parties would not be *ad idem* as to their bargain, and there would therefore be no contract.

Hannen J. also thought that the second question was probably misunderstood by the jury, and concurred with Blackburn J. in the distinction above pointed out.

He *said, that to justify a verdict for the defendant [*455] it was not enough for the jury to find that "the plaintiff believed the defendant to believe that he was buying old oats," but that what was necessary was, to find that "the plaintiff believed that the defendant believed that the plaintiff was *contracting* to sell old oats."

In the following very exceptional case, where the fraud of the vendor was committed not on the buyer, but by collusion with the buyer against another person, the vendor was not permitted to recover against the buyer.

§ 601. In *Jackson v. Duchaise*,¹ the facts were that the plaintiff sold the goods in a house to the defendant for 100*l.*, but she could not raise the money; she applied to one Walsh, to aid her in the purchase, and he at her request agreed to buy them from the plaintiff for 70*l.*, which he did, taking a bill of sale to himself. By agreement between the plaintiff and the defendant, she was to pay the deficiency of 30*l.* to him, in two notes, of 15*l.* each, and this was concealed from Walsh. On action brought by plaintiff on one of the two notes, Lord Kenyon, at *Nisi Prius*, and the Court in banc afterwards, held the transaction to be a fraud on Walsh,

¹ 3 T. R. 551. See *Webb v. Odell*, 183; *Gompertz v. Bartlett*, 2 El. & 49 N. Y. 583; *Gurney v. Womersley*, Bl. 849; s. c. 75 Eng. C. L. 849; *Azemar v. Caselle*, L. R. 2 C. P. 677.

and that plaintiff could not recover. The principle was the same as that on which secret agreements to give one creditor an advantage over others as an inducement to sign a composition in insolvency, are held fraudulent and void.²

In the Supreme Court of the State of Vermont it was held to be fraudulent in a vendor to sell a horse having an internal malady of a secret and fatal character, not apparent by any external indications, but known to the seller, and known by him to be unknown to the buyer, if the malady was such as to render the horse of *no value*.³

[*456] * *Section IV.* — FRAUD ON CREDITORS — STATUTE OF ELIZABETH.

§ 602. Sales made by debtors in fraud of creditors are usually considered as being governed by the statute 13 Eliz. c. 5,¹ and the decisions made under it; but other statutes had been previously passed on the same subject, and in *Cadogan v. Kennett*,² Lord Mansfield said that “the principles

² *Delgleish v. Tennent*, L. R. 2 Q. B. 49.

³ *Paddock v. Strobridge*, 29 Vermont, 470.

Concealment will be fraudulent where it is willful. *Carpenter v. Phillips*, 2 Houst. (Del.) 524; *Hanks v. McKee*, 2 Litt. (Ky.) 227; s. c. 13 Am. Dec. 265; *Atwood v. Chapman*, 68 Me. 38, 40; s. c. 28 Am. Rep. 5; *Prentiss v. Russ*, 16 Me. 30; *Patterson v. Kirkland*, 34 Miss. 423, 431; *Hanson v. Edgerly*, 29 N. H. 343, 359; *Gough v. Dennis*, Hill & Den. (N. Y.) 55; *Croyle v. Moses*, 90 Pa. St. 250; s. c. 35 Am. Dec. 654; *Krumbhaar v. Birch*, 83 Pa. St. 426, 428; *Cornelius v. Molloy*, 7 Pa. St. 293, 299; *Maynard v. Maynard*, 49 Vt. 297; *Paddock v. Strobridge*, 29 Vt. 470, 473; *Bank of United States v. Lee*, 38 U. S. (13 Pet.) 107, 119; bk. 10, L. ed. 81; *Blydenburgh v. Welsh*, Baldw. C. C. 331. But see *Beninger v. Corwin*, 24 N. J. L. (4 Zab.) 257, 264; *Cassel v. Herron*, 5 Clarke (Pa.), 250. But a

mere unintentional concealment or omission to disclose facts which are known to the vendor will not be fraudulent. *Hanson v. Edgerly*, 29 N. H. 343; *Stevens v. Fuller*, 8 N. H. 463; *Harris v. Tyson*, 24 Pa. St. 347; s. c. 64 Am. Dec. 661; *Kintzing v. McElrath*, 5 Pa. St. 467; *Fisher v. Budlong*, 10 R. I. 527, 528; *Howard v. Gould*, 28 Vt. 523; s. c. 67 Am. Dec. 728; *Laidlaw v. Organ*, 15 U. S. (2 Wheat.) 178; bk. 4, L. ed. 214.

¹ Statutes have been passed in various states regulating sales in fraud on creditors such as California, Delaware, Nebraska, Indiana, Iowa, Maryland, Minnesota, Missouri, New York, Wisconsin. See *Harter v. Donahoe* (Cal.), 9 Pac. Rep. 651; *Bassinger v. Spangler*, 9 Colo., 175; s. c. 10 Pac. Rep. 800, 818; *McKee v. Bassick Min. Co.*, 8 Colo. 392; s. c. 8 Pac. Rep. 501; *O’Gara v. Lowry*, 5 Mont. 427; 2 Schouler on Personal Property, § 616.

² Cowp. 432.

and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes 13 Eliz. c. 5, and 27 Eliz. c. 4. The former of these statutes relates to creditors only: the latter to purchasers. These statutes cannot receive too liberal a construction, or be too much extended in suppression of fraud."

The 13 Eliz. c. 5, was intended "for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, *alienations*, &c., &c., as well as of lands and tenements, as of *goods and chattels* . . . devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to *delay, hinder, or defraud creditors*³ . . . to the overthrow of all true and plain dealing, bargaining, and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued."

The statute, therefore, provides that all alienations, bargains, and conveyances of lands and tenements, or goods and chattels, made for any such intent and purpose as is

³ See *Freeman v. Burnham*, 36 Conn. 469; *Gridley v. Watson*, 53 Ill. 186; *Stewart v. Rogers*, 25 Iowa, 395; *Lowry v. Fisher*, 2 Bush (Ky.) 71; *Mitchell v. Berry*, 1 Met. (Ky.) 602; *Enders v. Williams*, 1 Met. (Ky.) 346; *Kuhn v. Stansfield*, 28 Md. 210; *Ellinger v. Crowl*, 17 Md. 361; *Filley v. Register*, 4 Minn. 391; s. c. 77 Am. Dec. 522; *Pomeroy v. Bailey*, 43 N. H. 118; *Coolidge v. Melvin*, 42 N. H. 531; *Babcock v. Eckler*, 24 N. Y. 623; *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481; s. c. 8 Am. Dec. 520; *Van Wyck v. Seward*, 6 Paige Ch. (N. Y.) 62; *Loeschigk v. Hatfield*, 5 Robt. (N. Y.) 26; *Chambers v. Spencer*, 5 Watts (Pa.) 404; *Hunters v. Waite*, 3 Gratt. (Va.) 26; *Church v. Chapin*, 35 Vt. 223; *Skarf v. Soulby*, 1 Mac. & G. 364; *Mackay v. Douglas*, L. R. 14 Eq. 106; *Crossley v. Elworthy*, L. R. 12 Eq. 158; *Freeman v. Pope*, L. R. 9 Eq. 206; s. c. L. R. 5 Ch. App. 538; *Reese*

River Silver Mining Co. v. Atwell, L. R. 7 Eq. 347; *Lush v. Wilkinson*, 5 Ves. 387. *Story on Sales* (4th ed.) § 513; 1 *Story Eq. Jur.* § 360.

But otherwise where the sale is made *bonâ fide* and under circumstances showing plainly that there was no intention to defraud creditors. *Kent v. Riley*, L. R. 14 Eq. 190. The reason for avoiding a contract in favor of an existing creditor, is because of a presumption that credit is given on apparent ownership of the property conveyed and for that reason does not apply to subsequent creditors with the notice of the transfer. *Converse v. Hartley*, 31 Conn. 372, 380.

Whether the transfer was fraudulent or *bonâ fide* is a question for the jury. *Pomeroy v. Bailey*, 43 N. H. 118. The presumption arising from the fact that the party indebted at the time of the transfer may be rebutted. *Gilbert v. Lewis*, 1 DeG. J. & S. 38.

above expressed, shall be “deemed and taken, (only against that person or persons, his or their heirs, successors, executors, administrators, and assigns, and every of them whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous, or fraudulent devices and practices as is [*457] aforesaid, *are, shall, or might be in anywise, disturbed, hindered, delayed, or defrauded,) to be clearly and utterly void, frustrate, and of none effect.” This statute was confirmed by 14 Eliz. c. 11, s. 1, and made perpetual by 29 Eliz. c. 5, s. 2. And it *seems* that it protects against fraudulent sales, subsequent creditors, as well as those having claims at the date of the fraudulent conveyance.⁴

§ 603. In Twyne’s case,¹ the celebrated leading case on this subject, the debtor had made a secret conveyance to Twyne by general deed of all his goods and chattels, worth 300*l.*, in satisfaction of a debt of 400*l.*, pending an action brought by another creditor for a debt of 200*l.* The debtor continued in possession of the goods, and sold some of them: and shorn the sheep and marked them with his own mark. The second creditor took the goods in execution, but Twyne resisted the sheriff, and Coke, the Queen’s Attorney-General, thereupon filed an information against him in the Star Chamber. The learned author says in his report that “In this case divers points were resolved:

“1. That this gift had the signs and marks of fraud, because the gift is general without exception of his apparel, or of any thing of necessity, for it is commonly said, *quod dolosus versatur in generalibus*.

“2. The donor continued in possession, and used them as

⁴ *Graham v. Furber*, 14 C. B. 410, and 23 L. J. C. P. 51. It is now settled that subsequent creditors may, under certain circumstances, maintain an action to set aside a fraudulent conveyance, and are in any case entitled to share in the benefit of proceedings taken by creditors having claims at the date of the conveyance. The cases are collected

in Robson on Bankruptcy, p. 153, ed. 1881. See, also, *Carter v. Grimshaw*, 49 N. H. 100; *McLane v. Johnson*, 43 Vt. 48; *Bank British North America v. Rattenbury*, 7 Grant (Ont.) 383; *Bonacina v. Seed*, 3 Low. Can. 446; *Spirrett v. Willows*, 3 De G. J. & S. 293.

¹ 3 Coke, 80; 1 Sm. L. C. 1.

his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.²

"3. It was made in secret, *et dona clandestina sunt semper suspiciosa*.

"4. It was made pending the writ.

"5. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud * is always apparelled and clad with a trust, [*458] and trust is the cover of fraud.

"6. The deed contains that the gift was made honestly, truly, and *bondâ fide*; *et clausulæ inconsuetæ semper inducunt suspicionem*.

§ 604. "Secondly, it was resolved that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, . . . yet it is not *bondâ fide*, for no gift shall be deemed to be *bondâ fide* . . . which is accompanied with any trust." Lord Coke therefore advises: "Reader,

² *Retention of possession by the seller of chattels* is evidence more or less conclusive of the fact of fraud upon third parties. See *Gilbert v. Decker*, 53 Conn. 401; *Capron v. Porter*, 43 Conn. 383; *Robbins v. Oldham*, 1 Duv. (Ky.) 28; *Farfield Bridge Co. v. Nye*, 60 Me. 372; *Ingalls v. Herrick*, 108 Mass. 351; *Coburn v. Pickering*, 3 N. H. 415; s. c. 14 Am. Dec. 375; *Clow v. Woods*, 5 Serg. & R. (Pa.) 275; s. c. 9 Am. Dec. 346; *Rothchild v. Rowe*, 44 Vt. 389. But such evidence is only *primâ facie* evidence of fraud. See *Jones v. Simpson*, 116 U. S. 609; bk. 29, L. ed. 742.

A transfer fraudulent as to existing creditors may be avoided by subsequent creditors; but where there is no fraud as to existing creditors the sale can be avoided by subsequent creditors only by showing that it was made with a view to incurring their own or similar liabilities. *Kerksey v. Snedecor*, 60 Ala. 192; *Dodd v. Adams*, 125 Mass. 398; *Day v. Cooley*, 118 Mass. 524; *Wadsworth v. Wil-*

liams, 100 Mass. 126, 130; *Winchester v. Charter*, 94 Mass. (12 Allen) 606, 609; *Thacher v. Phinney*, 89 Mass. (7 Allen) 146; *Carpenter v. Carpenter*, 25 N. J. Eq. (10 C. E. Gr.) 194; *Graham v. La Crosse & M. R. R. Co.*, 102 U. S. (12 Otto) 148, 155; bk. 26, L. ed. 106; *Smith v. Vodges*, 92 U. S. (2 Otto) 183; bk. 23, L. ed. 481; *Mattingly v. Nye*, 75 U. S. (8 Wall.) 370; bk. 19, L. ed. 380; *Sexton v. Wheaton*, 21 U. S. (8 Wheat.) 229; bk. 5, L. ed. 608. Some cases hold, however, that the transfer is void only as against those it was intended to defraud, and that ordinarily subsequent creditors cannot avoid the sale as fraudulent. *Donley v. McKiernan*, 62 Ala. 34; *Lloyd v. Bunce*, 41 Iowa, 660; *Sanders v. Chandler*, 26 Minn. 273; *Shand v. Hanley*, 71 N. Y. 319; *Arrowsmith v. O'Sullivan*, 44 N. Y. Super. Ct. (12 J. & S.) 573; *Harlan v. Maglaughlin*, 90 Pa. St. 293, 297; *Monroe v. Smith*, 79 Pa. St. 459; *Mullen v. Wilson*, 44 Pa. St. 413; *Snyder v. Christ*, 39 Pa. St. 499, 506; *Lemberg v. Biberstein*, 51 Tex. 457.

when any gift shall be made to you in satisfaction of a debt, by one who is indebted to others also: 1. Let it be made in a public manner, and before the neighbors, and not in private, for secrecy is a mark of fraud. 2. Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3. Immediately after the gifts, take the possession of them, for continuance of possession in the donor is the sign of trust. . .

“And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole Court, *that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud:*

‘Quæritur, ut crescent tot magna volumina legis
In promptu causa est, crescit in orbe dolus.’”

§ 605. In the application of the statute, a question of fact for the jury is constantly presented; namely, whether the transfer of the goods was *bonâ fide*, or fraudulent, that is, “with the end, purpose, and intent to delay, hinder, or defraud creditors,”¹ as the Act expresses it. It was, indeed, held in some early cases, of which the leading one is *Edwards v. Harben*,² that under certain circumstances this was a question of law for the Court. The decision was given in that case by Buller J. who said: “This has been argued by the defendant’s counsel as being a case in which the [*459] want of *possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes

¹ See *O’Brien v. Chamberlain*, 50 Cal. 285; *Harris v. Burns*, 50 Cal. 140; *Nicol v. Crittenden*, 55 Ga. 497; *Bradley v. Coolbaugh*, 91 Ill. 148; *Sibley v. Tie*, 88 Ill. 287; *Nimmo v. Kuykendall*, 85 Ill. 476; *Bushnell v. Wood*, 85 Ill. 88; *Mattingly v. Wulke*, 2 Ill. App. 169; *Powell v. Powell*, 71 N. Y. 71; *Holden v. Burnham*, 63 N. Y. 74; *Johnson v. Carley*, 53 How. (N. Y.) Pr. 326; *Stacy v. Deshaw*, 7 Hun (N. Y.) 449; *Hollacher v. O’Brien*, 5 Hun (N. Y.) 277; *Ferris v. Irons*, 83 Pa. St. 179; *McDonalds v. Titus*, 6 Alb.

L. J. 127; *Brooks v. Weaver*, 3 Alb. L. J. 283; *Cook v. Hendry*, 7 Up. Can. C. P. 354; *Fowler v. Hendry*, 7 Up. Can. C. P. 350; *Wight v. Moody*, 6 Up. Can. C. P. 502.

Fraud is never presumed and the burden of proving it in such cases is upon the plaintiff. *Hamilton’s Adm. v. Blackwell*, 60 Ala. 545; *Tompkins v. Nichols*, 53 Ala. 197; *Erb v. Cole*, 31 Ark. 554; *Jewett v. Cook*, 81 Ill. 260; *Morgan v. Olvey*, 53 Ind. 6; *Elliott v. Stoddard*, 98 Mass. 145.

² 2 T. R. 587, and see *post*, p. 461.

the transaction fraudulent in point of law: *that is the point which we have considered, and we are all of opinion that if there be nothing but the absolute conveyance without the possession, that, in point of law, is fraudulent.*"³ As this case does not appear ever to have been overruled,⁴ though frequently mentioned unfavorably, it may be assumed that the law would be held to be the same at the present time; but it is to be observed that, in the guarded form in which the principle is announced, a case could scarcely arise in which it would be applicable, for it is difficult to suppose that an action would be tried where *nothing* would be shown beyond a bare conveyance without possession: where something of the relations of the parties, and the circumstances of their dealings, would not appear. Apart from this very exceptional case, the authorities are all in accordance in treating the question of *Fraus vel non*, as one of fact for the jury, even where the vendor remains in possession.

§ 606. In *Latimer v. Batson*,¹ an execution had been levied on the household furniture, wine, &c., of the Duke of Marlborough at Blenheim, and an officer remained in possession some time, and then executed a bill of sale to the execution creditor, but the Duke prevailed on the latter to leave him in possession. The execution creditor afterwards sold the goods to the plaintiff Latimer for 700*l.*, and the plaintiff put a man-servant into the house. The Duke, also, remained there, and used the goods, as if no execution had been put in; but the execution was known in the neighborhood. The goods were then seized by a second creditor, and carried away. On these facts, Jervis contended that the judge ought to have directed the jury that if they thought
* the Duke remained in possession, the sale was void [*460]

³ See, also, *Paget v. Perchard*, 1 Esp. 205; *Martin v. Perchard*, 2 W. Bl. 702; *Ingalls v. Herrick*, 108 Mass. 351, 354; *Putnam v. Osgood*, 52 N. H. 154; *Coolidge v. Melvin*, 42 N. H. 510; *Garman v. Cooper*, 72 Pa. St. 32; *Young v. McLure*, 2 Watts & S. (Pa.) 147; *Rothchild v. Rowe*, 44 Vt. 389.

⁴ It was said to be good law by Lawrence J. in *Steel v. Brown*, 1 Taunt. 382; see, however, the remarks of Lefroy C. J. in the Irish case of *Macdona v. Swiney*, 8 Ir. C. L. R. 73, at pp. 84-86.

¹ 4 B. & C. 652.

citing *Wardall v. Smith*,² where Lord Ellenborough said that "to defeat an execution by a bill of sale there must appear to have been a *bonâ fide* substantial change of possession. It is a mere mockery to put in another person to take possession jointly with the former owner of the goods. A concurrent possession with the assignor is colorable. There must be an *exclusive* possession under the assignment, or it is fraudulent and void as against creditors." But the Court refused a new trial, affirming the propriety of the judge's charge, he having told the jury that if they thought the sale to the plaintiff was *bonâ fide*, and the purchase-money really paid by him, he was entitled to a verdict; but if the purchase-money was really paid by the Duke, and the sale to the plaintiff colorable, they should find for defendant. Bayley J. also held, in conformity with *Leonard v. Baker*,³ *Watkins v. Birch*,⁴ and *Jezeph v. Ingram*,⁵ that "*if goods seized under an execution are bonâ fide sold, and the buyer suffers the debtor to continue in possession of the goods, still they are protected against subsequent executions, if the circumstances under which he has the possession are known in the neighborhood.*"

§ 607. In *Martindale v. Booth*,¹ all the judges were of opinion that the continuance of possession in the vendor is not of itself sufficient to render void a sale of goods as fraudulent, especially where the possession is consistent with the deed which provides only for the future entry into possession by the purchaser, conditioned on the vendor's default; and in addition to the numerous cases there cited, those in the note² sufficiently establish the proposition that the *continued possession by the vendor of goods sold, is a fact to be considered by the jury as evidence of fraud, and is not in law a fraud per se.*³

² 1 Camp. 332.

³ 1 M. & S. 251.

⁴ 4 Taunt. 823.

⁵ 8 Taunt. 838, § 607.

¹ 3 B. & Ad. 498.

² *Lady Arundel v. Phipps*, 10 Ves. jr. 145; *per Buller J. in Hazelington v. Gill*, 3 T. R. 620, note 1; *Linden v. Sharp*, 6 M. & G. 895-898; *Pennell v. Dawson*, 18 C. B. 355.

³ *Retention of possession by the vendor, we have seen, may be evidence of fraud (vide ante, sec. 603, note 2), but is not per se fraudulent. See Crawford v. Kirksey*, 50 Ala. 590, 598; s. c. 55 Ala. 282, 285; *Mayer v. Clark*, 40 Ala. 259, 269; *George v. Norris*, 23 Ark. 121, 128; *Hempstead v. Johnson*, 18 Ark. 123, 134; s. c. 65 Am. Dec. 458; *Collins v. Taggart*, 57

§ 608. * That the notoriety of the sale is a strong [*461] circumstance to rebut the presumption of fraud even

Ga. 355; *Carter v. Stanfield*, 8 Ga. 49; *Peck v. Land*, 2 Ga. 1; *Rose v. Colter*, 76 Ind. 590; *Bentley v. Dunkle*, 57 Ind. 374; *Leasure v. Coburn*, 57 Ind. 274; *Kane v. Drake*, 27 Ind. 29; *Nutter v. Harris*, 9 Ind. 88; *Phillips v. Reitz*, 16 Kans. 396, 400; *Devonshire v. Gauthreaux*, 32 La. An. 1132; *Spivey v. Wilson*, 31 La. An. 653; *Richardson v. Cramer*, 28 La. An. 357; *Baltimore & O. R. R. v. Glenn*, 28 Md. 287, 324; *Webster v. Anderson*, 42 Mich. 554; s. c. 36 Am. Rep. 452; *Carpenter v. Graham*, 42 Mich. 191; *McLaughlin v. Lange*, 42 Mich. 81; *Webster v. Bailey*, 40 Mich. 641; *Molitor v. Robinson*, 40 Mich. 200; *Vose v. Stickney*, 19 Minn. 367, 369; *Hilliard v. Cagle*, 46 Miss. 309; *Summers v. Roos*, 42 Miss. 749; s. c. 2 Am. Rep. 653; *Comstock v. Rayford*, 20 Miss. (12 Smed. & M.) 369; *Rankin v. Holloway*, 11 Miss. (3 Smed. & M.) 614; *Carter v. Graves*, 7 Miss. (6 How.) 9; *Miller v. Morgan*, 11 Neb. 121; *Densmore v. Tomer*, 11 Neb. 118; *Morgan v. Bogue*, 7 Neb. 429; *Robinson v. Uhl*, 6 Neb. 328; *Miller v. Pancoast*, 29 N. J. L. (5 Dutch.) 250; *Hall v. Snowhill*, 14 N. J. L. (2 J. S. Gr.) 8; *Runyon v. Groshon*, 12 N. J. Eq. (1 Beas.) 86; *Blaut v. Gabler*, 77 N. Y. 461; *Tilson v. Terwilliger*, 56 N. Y. 273; *May v. Walter*, 56 N. Y. 8; *Mitchell v. West*, 55 N. Y. 107; *Van Buskirk v. Warren*, 4 Abb. App. Dec. (N. Y.) 457; *Bissell v. Hopkins*, 3 Cow. (N. Y.) 166, 188; s. c. 15 Am. Dec. 259; *Betz v. Conner*, 7 Daly (N. Y.) 550; *Hanford v. Artcher*, 4 Hill (N. Y.) 271; *Butler v. Van Wyck*, 1 Hill (N. Y.) 438, 450; *Tate v. McCormick*, 23 Hun (N. Y.) 218; *Schoonmaker v. Vervalen*, 9 Hun (N. Y.) 138; *Hollacher v. O'Brien*, 5 Hun (N. Y.) 277; *Sturtevant v. Ballard*, 9 Johns. (N. Y.) 337; s. c. 6 Am. Dec. 281; *Smith v.*

Acker, 23 Wend. (N. Y.) 653; *Beekman v. Bond*, 19 Wend. (N. Y.) 444; *Randall v. Crook*, 17 Wend. (N. Y.) 53; *Boone v. Hardie*, 83 N. C. 470; *Rea v. Alexander*, 5 Ired. (N. C.) L. 644; *Collins v. Myers*, 16 Ohio, 547, 552; *Hombeck v. Vanmetre*, 9 Ohio, 153; *Burbridge v. Seely*, *Wright* (Ohio) 359; *Rogers v. Dare*, *Wright* (Ohio) 136; *McCully v. Swackhamer*, 6 Oreg. 438; *Moore v. Floyd*, 4 Oreg. 101; *Sarle v. Arnold*, 7 R. I. 528, 587; *Anthony v. Wheatons*, 7 R. I. 490, 498; *Smith v. Henry*, 2 Bail. (S. C.) 118; *Terry v. Belcher*, 1 Bail. (S. C.) 568; *Fulmore v. Burrows*, 2 Rich. (S. C.) Eq. 96; *Tennessee Nat. Bank v. Ebbert*, 9 Heisk. (Tenn.) 153; *Galt v. Dibrell*, 10 Yerg. (Tenn.) 146; *Maney v. Kilbough*, 7 Yerg. (Tenn.) 443; *Young v. Pate*, 4 Yerg. (Tenn.) 164; *Darwin v. Handley*, 3 Yerg. (Tenn.) 502; *Scott v. Alford*, 53 Tex. 82, 92; *Kerr v. Hutchins*, 46 Tex. 384; *Green v. Banks*, 24 Tex. 508; *Gibson v. Hill*, 21 Tex. 225; *Sipe v. Earman*, 26 Gratt. (Va.) 563; *Dance v. Seaman*, 11 Gratt. (Va.) 778; *Forkner v. Stewart*, 6 Gratt. (Va.) 197; *Davis v. Turner*, 4 Gratt. (Va.) 422; *Williams v. Porter*, 41 Wis. 422; *Bullis v. Borden*, 21 Wis. 136; *Smith v. Welch*, 10 Wis. 91; *Whitney v. Brunette*, 3 Wis. 621; *Sterling v. Ripley*, 3 Chand. (Wis.) 166; *Robinson v. Elliott*, 89 U. S. (22 Wall.) 513, 523; bk. 22, L. ed. 758; *Warner v. Norton*, 61 U. S. (20 How.) 448, 460; bk. 15, L. ed. 950; *Hamilton v. Russell*, 1 Cr. C. C. 97.

Reservation of power of sale.—In all instances where power of sale is retained with the possession of the goods it is fraudulent, unless such sale is to be made by the former possessor as the agent of and for the buyer, in which case the transaction will be perfectly valid. *Goodheart*

where the vendor retains possession, is shown by the cases quoted in the above opinion, delivered by Bayley J. in *Latimer v. Batson*, to which may be added *Kidd v. Rawlinson*,¹ *Cole v. Davies*² [and *Macdona v. Swiney*³].

In *Hale v. Metropolitan Omnibus Company*,⁴ Vice-Chancellor Kindersley expressed the modern doctrine in these terms: "It was at one time attempted to lay down rules that particular things were indelible badges of fraud, but in truth every case must stand upon its own footing, and the Court or the jury must consider whether, having regard to all the circumstances, the transaction was a fair one, and intended to pass the property or a valuable consideration."

§ 609. It is well settled that the mere intention to defeat the execution of a creditor will not avoid a sale as fraudulent, if it be made *bonâ fide* for a valuable consideration.¹ Nor is it a fraud to mortgage personal property for money actually lent to the mortgagor, even though the mortgagor's intention may be thus to defeat the expected execution of a judg-

v. Johnson, 88 Ill. 58; *Barnet v. Fergus*, 51 Ill. 352; *Hughes v. Cory*, 20 Iowa, 399; *Joseph v. Levi*, 58 Miss. 843; *Harman v. Hoskins*, 56 Miss. 142; *Hewson v. Tootle*, 72 Mo. 632; *Weber v. Armstrong*, 70 Mo. 217; *Southard v. Benner*, 72 N. Y. 424; *Freeman v. Rawson*, 5 Ohio St. 1; *Scott v. Alford*, 53 Tex. 82, 95; *Robinson v. Elliott*, 89 U. S. (22 Wall.) 513, 524; bk. 22, L. ed. 758; *Brett v. Carter*, 2 Low. C. C. 458; *Contra, Russell v. Winne*, 37 N. Y. 591, 595; *Edgell v. Hart*, 9 N. Y. 213; s. c. 59 Am. Dec. 532; *Griswold v. Sheldon*, 4 N. Y. 581; *Collins v. Myers*, 16 Ohio, 547; *Tennessee Nat. Bank v. Ebbert*, 9 Heisk. (Tenn.) 153, 159.

¹ 2 Bos. & P. 59.

² 1 Ld. Raym. 724.

³ 8 Ir. C. L. R. 73.

⁴ 30 L. J. Ch. 777.

¹ *Wood v. Dixie*, 7 Q. B. 892; *Riches v. Evans*, 9 C. & P. 640; *Hale v. Metropolitan Omnibus Co.*, 30 L. J. Ch. 777. See, also, *Ingraham v. Wheeler*, 6 Conn. 277; *Matthews v.*

Jordan, 88 Ill. 602; *Nimmo v. Kuykendall*, 85 Ill. 476; *Francis v. Rankin*, 84 Ill. 169; *Morris v. Tillson*, 81 Ill. 607; *Storey v. Agnew*, 2 Ill. App. 353; *Gray v. McCallister*, 50 Iowa, 497; *Bostwick v. Burnett*, 74 N. Y. 317; *Dudley v. Danforth*, 61 N. Y. 626; *Hauselt v. Vilmar*, 2 Abb. (N. Y.) N. C. 222; *Archer v. O'Brien*, 7 Hun (N. Y.) 146; *Stacy v. Deshaw*, 7 Hun (N. Y.) 449; *Alton v. Harrison*, L. R. 4 Ch. App. 622; *Spencer v. Slater*, L. R. 4 Q. B. Div. 13; *Boldero v. London Loan and Discount Co.*, 5 Ex. Div. 47; *McKay v. Farish*, 1 Up. Can. Ch. Rep. (1 Grant) 333; *Clark v. Morrell*, 21 Up. Can. Q. B. 596; *Armstrong v. Moodie*, 6 Up. Can. Q. B. (O. S.) 538; *Hooker v. Jarvis*, 6 Up. Can. Q. B. (O. S.) 439; *Dalglish v. McCarthy*, 19 Grant (Ont.) 578; *Dock v. Johnston*, 2 Kerr (N. B.) 319; *Hayward v. White*, 2 Kerr (N. B.) 304; *Kinnear v. White*, 2 Kerr (N. B.) 235; *Connell v. Millar*, 1 Kerr (N. B.) 302.

ment creditor;² nor to confess a judgment in favor of one creditor for the purpose of giving him a preference over another who is on the eve of issuing execution on a judgment previously obtained.³

² *Darvill v. Terry*, 6 H. & N. 807, and 30 L. J. Ex. 355.

³ *Holbird v. Anderson*, 5 T. R. 235. See, also, *Evans v. Hamilton*, 56 Ind. 34; *Beards v. Wheeler*, 11 Hun (N. Y.) 539; *Frazer v. Thatcher*, 49 Tex. 26.

Sale by insolvent debtor in good faith and for an adequate consideration is valid. *Erb v. Cole*, 31 Ark. 554; *Bowden v. Bowden*, 75 Ill. 143, 147; *Miller v. Kirby*, 74 Ill. 242, 246; *Herkelrath v. Stookey*, 63 Ill. 486; *Hessing v. McCloskey*, 37 Ill. 352; *Wood v. Shaw*, 29 Ill. 444; *Ewing v. Runkle*, 20 Ill. 448; *McConnell v. Wilcox*, 2 Ill. (1 Scam.) 344.

Participation in fraud by purchaser. — A sale to be fraudulent as to creditors must be made with the intent to hinder, delay, or defraud them, in which purpose the purchaser must participate by purchasing with a view and aim to aid and forward it. *Erb v. Cole*, 31 Ark. 554; *Galbreath v. Cook*, 30 Ark. 417; *Christian v. Greenwood*, 23 Ark. 258; s. c. 17 Am. Dec. 104; *Dardenne v. Hardwick*, 9 Ark. 482; *Bodwen v. Bodwen*, 75 Ill. 143, 147; *Gridley v. Bingham*, 51 Ill. 153; *Myers v. Kinzie*, 26 Ill. 36; *Brown v. Riley*, 22 Ill. 45. The participation in the fraud upon the part of the grantee will be shown by establishing the fact that he had knowledge of the grantor's fraudulent purpose, or knowledge of such other facts and circumstances as ought to have put the vendee upon such inquiry as would have led to an ascertainment of the truth; or that the purchaser purposely or negligently omitted to make such inquiries as an ordinarily prudent man in the circumstances would make. *Christian v. Greenwood*, 23 Ark. 258; s. c. 79 Am. Dec.

104; *Kellogg v. McGann*, 48 Iowa, 299; *Drummond v. Couse*, 39 Iowa, 442; *Steele v. Ward*, 25 Iowa, 535; *Hopkins v. Langton*, 30 Wis. 379. The fact that the vendee knew that the vendor intended to hinder, delay, and defraud his creditors, however, is not conclusive evidence of the former's intent to aid the latter in an intent to defraud his creditors, so as to render the sale fraudulent. Actual intent of the vendee and the true character of the transaction, are questions of fact to be left to the jury with other facts, and to be determined by them upon the consideration of all the circumstances. *Brown v. Foree*, 7 B. Mon. (Ky.) 357; s. c. 46 Am. Dec. 519.

Where the consideration is valuable and adequate the title of the grantee may be good notwithstanding the fraudulent intent of the grantor, if the grantee did not participate therein. *Parton v. Yates*, 41 Ind. 459; *Carlisle v. Gaskill*, 4 Ind. 219; *Hutchinson v. Horn*, 1 Smith (Ind.) 242; s. c. 50 Am. Dec. 470.

A creditor may purchase bonâ fide of his debtor although he knew the object of the latter in making the sale was to defeat other creditors. *Worland v. Kimberlin*, 6 B. Mon. (Ky.) 608; s. c. 44 Am. Dec. 785; *Young v. Stallings*, 5 B. Mon. (Ky.) 307; *Pearson v. Rockhill* 4 B. Mon. (Ky.) 299; *Ford v. Williams*, 3 B. Mon. (Ky.) 550.

An innocent purchaser who has bought in a bonâ fide manner at a fair price cannot be deprived of his property because the object of the seller was to defraud his creditors. See *Massie v. Enyart*, 32 Ark. 251; *Paige v. O'Neal*, 12 Cal. 498; *Michigan C. R. R. Co. v. Phillips*, 60 Ill.

197; *Fawcett v. Osborn*, 32 Ill. 423; *Kellogg v. Aherin*, 48 Iowa, 299; *Stewart v. Inglehart*, 7 Gill & J. (Md.) 132; s. c. 28 Am. Dec. 202; *Wiggin v. Swett*, 47 Mass. (6 Metc.) 194; s. c. 39 Am. Dec. 716; *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 307; s. c. 23 Am. Dec. 607; *Howe v. Waysman*, 12 Mo. 169; s. c. 49 Am. Dec. 126; *Farrel v. Colwell*, 30 N. J. L. (1 Vr.) 123; *Atwood v. Impson*, 20 N. J. Eq. (5 C. E. Gr.) 155; *Barnard v. Campbell*, 58 N. Y. 73; s. c. 17 Am. Rep. 208; *Winne v. McDonald*, 39 N. Y. 240; *Western Trans. Co. v. Marshall*, 6 Abb. (N. Y.) Pr. N. S. 283; *Penfield v. Dunbar*, 64 Barb. (N. Y.) 250; *Dows v. Rush*, 28 Barb. (N. Y.) 184; *Hoyt v. Sheldon*, 3 Bosw. (N. Y.) 296; *Durell v. Haley*, 1 Paige Ch. (N. Y.) 492; s. c. 19 Am. Dec. 444; *Andrew v. Dieterich*, 14 Wend. (N. Y.) 34; *Root v. French*, 13 Wend. (N. Y.) 570; s. c. 28 Am. Dec. 482; *Williams v. Merle*, 11 Wend. (N. Y.) 80; s. c. 25 Am. Dec. 604; *Manufacturers' &c. Bank v. Farmers' &c. Bank*, 2 T. & C. (N. Y.) 402; *Moore v. Miller*, 6 Lans. (N. Y.) 402; *Sinclair v. Healy*, 40 Pa. St. 417; s. c. 80 Am. Dec. 589; *Scott v. Heilager*, 14 Pa. St. 238; *Hood v. Fahnestock*, 8 Watts (Pa.) 489; s. c. 34 Am. Dec. 489; *Price v. Junkin*, 4 Watts (Pa.) 85; s. c. 28 Am. Dec. 685; *Sydnor v. Roberts*, 13 Tex. 598; s. c. 65 Am. Dec. 84; *Rateau v. Bernard*, 3 Blatchf. C. C. 244; *In re Sime*, 12 Nat. Bank. Reg. 318.

A bonâ fide purchaser from a fraudulent purchaser is not affected by the fraud though the grantor had notice of or was a party to the fraud. *Lee v. Abbe*, 2 Root (Conn.) 359; s. c. 1 Am. Dec. 78; *Dugan v. Vattier*, 3 Blackf. (Ind.) 425; s. c. 25 Am. Dec. 105; *Thomas v. Mead*, 8 Mart. (La.) N. S. 341; s. c. 19 Am. Dec. 187; *Miles v. Oden*, 8 Mart. (La.) N. S. 214; s. c. 19 Am. Dec. 177; *Stewart v. Inglehart*, 7 Gill & J. (Md.) 132; s. c. 28 Am. Dec. 202; *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 307;

s. c. 23 Am. Dec. 607; *Somes v. Brewer*, 19 Mass. (2 Pick.) 184; s. c. 13 Am. Dec. 406; *Hendicks v. Mount*, 5 N. J. L. (2 South.) 738; s. c. 8 Am. Dec. 623; *Anderson v. Roberts*, 18 Johns. (N. Y.) 515; s. c. 9 Am. Dec. 235; *Osborne v. Moss*, 7 Johns. (N. Y.) 161; s. c. 5 Am. Dec. 252; *Sands v. Codwise*, 4 Johns. (N. Y.) 536; s. c. 4 Am. Dec. 205; *Durell v. Haley*, 1 Paige Ch. (N. Y.) 492; s. c. 19 Am. Dec. 444; *Root v. French*, 13 Wend. (N. Y.) 570; s. c. 28 Am. Dec. 482; *Coleman v. Cocke*, 6 Rand. (Va.) 618; s. c. 18 Am. Dec. 757; *Garland v. Rives*, 4 Rand. (Va.) 282; s. c. 15 Am. Dec. 756; *Peaslee v. Barney*, 1 D. Chip. (Vt.) 331; s. c. 6 Am. Dec. 743.

It is well settled that where the owner of goods voluntarily sells and delivers them to a fraudulent purchaser who does not intend to pay for them, or who pays for them with stolen property, or with forged notes, or who promises to give security and fails to do so, or who is guilty of any other fraud effecting the sale so as to enable the vendor to reclaim the goods for such fraudulent vendee or the vendor rescinds the sale, sells or pledges the goods for a valuable consideration to a *bonâ fide* purchaser or vendee without notice of the fraud the latter will get a good title against the original owner. *Williamson v. Russell*, 39 Conn. 406; *Mears v. Waples*, 3 Houst. (Del.) 581; *Kern v. Thurber*, 57 Ga. 172; *Chicago Dock Co. v. Foster*, 48 Ill. 507; *Fawcett v. Osborn*, 32 Ill. 411; *Brundage v. Camp*, 21 Ill. 330; *Jennings v. Gage*, 13 Ill. 614; s. c. 56 Am. Dec. 476; *Bell v. Cafferty*, 21 Ind. 411; *Wood v. Yeatman*, 15 B. Mon. (Ky.) 270; *Gibson v. Moore*, 7 B. Mon. (Ky.) 92; *Miles v. Oden*, 8 Mart. (La.) N. S. 214; s. c. 19 Am. Dec. 177; *Titcomb v. Wood*, 38 Me. 561; *Ditson v. Randall*, 33 Me. 202; *Hoffman v. Noble*, 47 Mass. (6 Metc.) 68; s. c. 39 Am. Dec. 711; *Rowley v. Bigelow*, 29 Mass. (12 Pick.) 307;

§ 610. In America, it is somewhat remarkable that the ruling of the King's Bench, in *Edwards v. Harben*,¹ has not only been followed to its full extent, but the doctrine has been pushed even beyond the principle there established.

s. c. 23 Am. Dec. 607; *Barnard v. Campbell*, 58 N. Y. 73; s. c. 17 Am. Rep. 208; *Western Trans. Co. v. Marshall*, 37 Barb. (N. Y.) 509; *Dows v. Greene*, 32 Barb. (N. Y.) 490; *Dows v. Rush*, 28 Barb. (N. Y.) 157; *Mowrey v. Welsh*, 8 Cow. (N. Y.) 238; *Craig v. Marsh*, 2 Daly (N. Y.) 61; *Beavers v. Lane*, 6 Duer (N. Y.) 232; *Danforth v. Dart*, 4 Duer (N. Y.) 101; *Lewis v. Palmer, Hill & Den.* (N. Y.) 68; *Durell v. Haley*, 1 Paige Ch. (N. Y.) 492; s. c. 19 Am. Dec. 444; *Root v. French*, 13 Wend. (N. Y.) 570; s. c. 28 Am. Dec. 428; *Sinclair v. Healy*, 40 Pa. St. 417; s. c. 80 Am. Dec. 589; *Thompson v. Lee*, 3 Watts & S. (Pa.) 479; *Hawkins v. Davis*, 5 Baxt. (Tenn.) 698; *Arendale v. Morgan*, 5 Sneed (Tenn.) 703; *Williams v. Given*, 6 Gratt. (Va.) 268; *Shufeldt v. Pease*, 16 Wis. 659.

An insolvent debtor may prefer one creditor to another, either by judgment or in any mode except by an assignment in trust, and although such preferment may delay a creditor not preferred, or prevent obtaining payment at all, yet if the motive is simply to pay an existing debt the transaction will be valid. *Smith v. Skeary*, 47 Conn. 47, 54; *Leischer v. Dignon*, 53 Iowa, 288; *Whitehead v. Woodruff*, 11 Bush (Ky.) 209; *Beurmann v. Van Buren*, 44 Mich. 496, 499; *Brigham v. Fawcett*, 42 Mich. 542; *Hill v. Bowman*, 35 Mich. 191; *Butler v. White*, 25 Minn. 432; *Eldridge v. Phillipson*, 58 Miss. 270; *Dudley v. Danforth*, 61 N. Y. 626; *Covanhovan v. Hart*, 21 Pa. St. 495; s. c. 60 Am. Dec. 57; *Gans v. Renshaw*, 2 Pa. St. 36; s. c. 44 Am. Dec. 152; *Gage v. Chesebro*, 49 Wis. 486, 494; *Tompkins v. Wheeler*, 41

U. S. (16 Pet.) 118; bk. 1, L. ed. 903; *Marbury v. Brooks*, 20 U. S. (7 Wheat.) 556; bk. 5, L. ed. 522; s. c. 24 U. S. (11 Wheat.) 78; bk. 6, L. ed. 423. See *Ferguson v. Spear*, 65 Me. 277; *Blennerhassett v. Sherman*, 105 U. S. (15 Otto) 100, 117; bk. 26, L. ed. 1080; *Clarke v. White*, 37 U. S. (12 Pet.) 178, 200; bk. 9, L. ed. 1046.

¹ 2 T. R. 587; *ante*, p. 458.

² See *Grum v. Barney*, 55 Cal. 224; *Watson v. Rodgers*, 53 Cal. 401; *O'Brien v. Chamberlain*, 50 Cal. 285; *McCraw v. Welch*, 2 Colo. 284; *Mead v. Noyes*, 54 Conn. 487; *Hatstat v. Blakeslee*, 41 Conn. 301; *Norton v. Doolittle*, 32 Conn. 411; *Swift v. Thompson*, 9 Conn. 63, 69; s. c. 21 Am. Dec. 718; *Bowman v. Herring*, 4 Harr. (Del.) 458; *Perry v. Foster*, 3 Harr. (Del.) 293; *Smith v. Hines*, 10 Fla. 258, 295; *Wilson v. Lott*, 5 Fla. 305, 525; *Gibson v. Love*, 4 Fla. 217, 238; *Allen v. Carr*, 85 Ill. 388; *Ticknor v. McClelland*, 84 Ill. 471, 474; *Lefever v. Mires*, 81 Ill. 456; *Thompson v. Wilhite*, 81 Ill. 356; *Straus v. Minzesheimer*, 78 Ill. 492; *Walker v. Collier*, 37 Ill. 362; *Ketchum v. Watson*, 24 Ill. 591; *McCann v. Meyer*, 4 Ill. App. 376. But see *Broadwell v. Howard*, 77 Ill. 307; *Hickok v. Buell*, 51 Iowa, 655; *Smith v. Champney*, 50 Iowa, 174; *McKay v. Clapp*, 47 Iowa, 418; *Sutton v. Ballou*, 46 Iowa, 517; *Boothby v. Brown*, 40 Iowa, 104; Iowa Code, sec. 93; *Kendall v. Hughes*, 7 B. Mon. (Ky.) 368, 370; *Woodrow v. Davis*, 2 B. Mon. (Ky.) 298; *Morton v. Ragan*, 5 Bush (Ky.) 334; *Anthony v. Wade*, 1 Bush (Ky.) 110; *Brummel v. Stockton*, 3 Dana (Ky.) 135; *Robbins v. Oldham*, 1 Duv. (Ky.) 28; *Allen v. Johnson*, 4 J. J. Marsh.

Chancellor Kent erroneously supposes the English law to be unsettled on the question,³ but he states it to be the established law in the Federal Courts of the United States, that an * absolute bill of sale is *itself* a fraud

(Ky.) 235; Reed v. Reed, 70 Me. 504; Fairfield Bridge Co. v. Nye, 60 Me. 372, 377; McKee v. Garcelon, 60 Me. 165, 168; s. c. 11 Am. Rep. 200; Sawyer v. Nichols, 40 Me. 212; Vining v. Gilbreth, 39 Me. 496; Green v. Trieber, 3 Md. 28; Gough v. Edelen, 5 Gill. (Md.) 101; Harlow v. Hall, 132 Mass. 232; Hobbs v. Carr, 127 Mass. 532; Russell v. O'Brien, 127 Mass. 349; Dempsey v. Gardner, 127 Mass. 381; s. c. 34 Am. Rep. 389; Thorndike v. Bath, 114 Mass. 116; s. c. 19 Am. Rep. 318; Ingalls v. Herrick, 108 Mass. 351; Cushing v. Breed, 96 Mass. (14 Allen) 376; Burge v. Cone, 88 Mass. (6 Allen) 412; Stinson v. Clark, 88 Mass. (6 Allen) 340; Veazie v. Somerby, 87 Mass. (5 Allen) 280, 289; Green v. Rowland, 82 Mass. (16 Gray) 58; Hardy v. Potter, 76 Mass. (10 Gray) 89; Rourke v. Bullens, 74 Mass. (8 Gray) 549; Packard v. Wood, 70 Mass. (4 Gray) 307, 311; Phelps v. Cutler, 70 Mass. (4 Gray) 137; Carter v. Willard, 36 Mass. (19 Pick.) 1, 11; Tuxworth v. Moore, 26 Mass. (9 Pick.) 347; s. c. 20 Am. Dec. 479; Shumway v. Rutter, 24 Mass. (7 Pick.) 56; s. c. 19 Am. Dec. 340; Lanfear v. Sumner, 17 Mass. 110, 113; s. c. 9 Am. Dec. 119; Stern v. Henley, 68 Mo. 262; Wright v. Cormick, 67 Mo. 426; Bishop v. O'Connell, 56 Mo. 158; Claflin v. Rosenberg, 42 Mo. 439, 448; s. c. 43 Mo. 593; Bosse v. Thomas, 3 Mo. App. 472; Cator v. Collins, 2 Mo. App. 225; Gray v. Sullivan, 10 Nev. 416; Lawrence v. Burnham, 4 Nev. 361, 366; Lang v. Stockwell, 55 N. H. 561; Putnam v. Osgood, 52 N. H. 148, 154; Coolidge v. Melvin, 42 N. H. 510; Clapp v. Rogers, 38 N. H. 435, 438; Kendall v. Fitts, 22 N. H.

1, 7; Clark v. Morse, 10 N. H. 236; French v. Hall, 9 N. H. 145; s. c. 32 Am. Dec. 341; Paul v. Crooker, 8 N. H. 288; Coburn v. Pickering, 3 N. H. 415, 428; s. c. 14 Am. Dec. 345; Evans v. Scott, 89 Pa. St. 136; McMarlan v. English, 74 Pa. St. 296; Garman v. Cooper, 72 Pa. St. 32, 36; McKibbin v. Martin, 64 Pa. St. 352, 356; s. c. 3 Am. Rep. 588; Winslow v. Leonard, 24 Pa. St. 14, 18; Boyle v. Rankin, 22 Pa. St. 168; Babb v. Clemson, 10 Serg. & R. (Pa.) 428; s. c. 13 Am. Dec. 684; Clow v. Woods, 5 Serg. & R. (Pa.) 275; s. c. 9 Am. Dec. 346; McBride v. McClelland, 6 Watts & S. (Pa.) 94; Young v. McClure, 2 Watts & S. (Pa.) 150. Continued possession of the seller under a lawful contract to hold the property as the buyer's bailee will protect the property against the seller's credit. Smith v. Chrisman, 91 Pa. St. 428. Where the property is in possession of a third person no delivery or notice is necessary. Woods v. Hull, 81 Pa. St. 451; Worman v. Kramer, 73 Pa. St. 378, 385; Trunick v. Smith, 63 Pa. St. 18; Linton v. Butz, 7 Pa. St. 89; s. c. 47 Am. Dec. 501; Hildreth v. Fitts, 53 Vt. 684, 687; Weeks v. Prescott, 53 Vt. 57, 72; Pettingill v. Elkins, 50 Vt. 431; Stephenson v. Clark, 20 Vt. 624; Whitney v. Lynde, 16 Vt. 579; Rockwood v. Collamer, 14 Vt. 141.

For decisions that sales are void as to creditors of and purchasers from the seller until delivery is made, see Allen v. Massey, 84 U. S. (17 Wall.) 351; bk. 21, L. ed. 542; Hamilton v. Russell, 5 U. S. (1 Cr.) 309, 316; bk. 2, L. ed. 118; Williams v. Rapelje, 8 Up. Can. C. P. 186; Ranney v. Moody, 6 Up. Can. C. P. 471.

³ 2 Kent, 521.

in law unless possession accompanies and follows the deed; and in a recent case⁴ it was even decided that the *bona fides* of the transaction between the parties, and the fact that possession remained with the vendor for justifiable purposes, would not suffice to render the sale valid. This seems also to be the doctrine of the State Courts in Virginia,⁵ South Carolina, Pennsylvania, Illinois, New Jersey, Vermont, and Connecticut, while the English rule pervades the other States.

§ 611. [The legislation with reference to bills of sale has rendered obsolete a part of the law under the statute of 13 Eliz. c. 5. so far as relates to the transfer of chattels. The statutes now in force are the 41 & 42 Vict. c. 31 (Bills of Sale Act, 1878), and the 45 & 46 Vict. c. 43 (Bills of Sale Act (1878), Amendment Act, 1882). By the Bills of Sale Act, 1878, the 17 & 18 Vict. c. 36 (Bills of Sale Act, 1854), and the 29 & 30 Vict. c. 96 (Bills of Sale Act, 1866), were repealed, except as to bills of sale executed before the 1st of January, 1879 (the day when the Act came into operation), and even as to such bills of sale the rules with respect to construction, and to the renewal of registration, were to be those of the Act of 1878.

The object of the legislation on this subject is thus stated in the preamble to the Act of 1854:—“Whereas frauds are frequently committed upon creditors by secret bills of sale of personal chattels, whereby persons are enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees or holders of such bills of sale have the power of taking possession of the property of such persons to the exclusion of the rest of their creditors.”]

⁴ The *Romp*, Olcott's Adm. 196, cited in note at p. 520, 2 Kent. Com. (12th ed.)

⁵ The English doctrine, it would seem, is now established in Virginia.

See the *Baltimore and Ohio Railroad Co. v. Glenn*, 28 Md. 287, at pp. 324, 325, where the Virginian authorities are reviewed.

[*463] *Section V.—FRAUD ON CREDITORS — BILLS OF SALE.

§ 612. [By reason of the passing of the Bills of Sale Acts, 1878 and 1882, since the second edition of this treatise, a large portion of the law under the Act of 1854 has been rendered obsolete. The editors have therefore found it necessary to re-write this portion of the work; and, in doing so, have deemed it advisable to treat the subject under a separate section. It has been thought well to set out in full the main provisions of the Act of 1878, with the principal decisions thereunder, briefly noticing the alterations occasioned by the Act of 1882.¹ Those portions of the Act of 1878 which were not contained in the previous Act of 1854 are printed in italics.

§ 613. By the 4th section, “The expression ‘bill of sale’ is to include bills of sale, assignments, transfers, declarations of trust without transfer, *inventories of goods with receipt thereto attached, or receipts for purchase-moneys of goods*, and other assurances of personal chattels, and also powers of attorney, authorities, or licenses to take possession of personal chattels as security for any debt, *and also any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred*, but is not to include the following documents; that is to say, assignments for the benefit of the creditors of the person making or giving the same, marriage settlements, transfers or assignments of any ship or vessel or any share thereof, transfers of goods in the ordinary course of business of any trade or calling, bills of sale of goods in foreign parts or at sea, bills of lading, India warrants, warehouse-keepers’ certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by

¹ This Act only received the Royal Assent at the time when the sheets of this edition were passing through the press.

* delivery the possessor of such document to transfer [*464] or receive goods thereby represented."

In the case of *Allsopp v. Day*,¹ a receipt for money given by a husband to the trustees of his wife's settlement "for the purchase of my household goods and effects contained in the enclosed inventory" was held under the Act of 1854 not to be a bill of sale; and this decision was followed in *Byerley v. Prevost*.²

But the authority of these cases had been questioned before the Act of 1878 in *Ex parte Odell*³ and *Ex parte Cooper*,⁴ and now they are expressly within the words of the above section.

§ 614. The effect, however, of the section is much restricted by the late decision of the Court of Appeal in *Marsden v. Meadows*,¹ where it was decided that an inventory of goods with a receipt for the purchase-money given to a purchaser by a sheriff who had seized under a writ of *fi. fa.* does not amount to a bill of sale under this section, and need not be registered. The restriction intended to be put upon the words of the enactment appears to be that inventories and receipts to be within the Act must operate as assurances, or to use Lord Justice Cotton's words, must be "documents on which the title of the transferee of the goods depends, either as the actual transfer of the property, or an agreement to transfer, or as a muniment or document of title taken, to use an expression found in some of the cases, at the time as a record of the transaction." Here the claimant had a complete title to the goods, before the receipt by the sheriff was given. The receipt was mere surplusage.

The words "any agreement . . . by which a right in equity to any chattels shall be conferred" are declaratory of the law as laid down in cases before the Act.²

As to transfers of shares in ships, reference should be * made to the Merchant Shipping Act, 1854 (17 [*465]

¹ 7 H. & N. 457; 31 L. J. Ex. 105.

² L. R. 6 C. P. 144.

³ 10 Ch. D. 76, C. A.

⁴ Ibid. 313, C. A.

¹ 7 Q. B. D. 80, C. A., following

Woodgate v. Godfrey, 5 Ex. D. 24, C. A.; s. c. 4 Ex. D. 59, decided under the Act of 1854.

² *Ex parte Mackay*, 8 Ch. 643; *Ex parte Conning*, 16 Eq. 414.

& 18 Vict. c. 104, ss. 55, 57, 81). And a ship built for a foreigner, and which, therefore, could not be registered as a British ship, is within the exception.³

As to transfers of goods in the ordinary course of business, the reader is referred to the cases below cited.⁴

Foreign parts include Scotland.⁵

§ 615. In *Ex parte Crawcour*,¹ it was held under the Act of 1854 that an agreement for the hire and conditional purchase, by instalments, of furniture, whereby the property in the furniture was to remain in the latter until the payment of all the instalments, and he was to have *power to seize the furniture upon failure to pay any of the instalments*, did not amount to a bill of sale by the hirer to the letter, inasmuch as no property in the furniture passed to the hirer until the payment of the full amount of the instalments.

By the 4th section it also provided, that "The expression 'personal chattels' shall mean goods, furniture, and other articles capable of complete transfer by delivery, and (*when separately assigned or charged*) fixtures and *growing crops*, but shall not include chattel interests in real estate, *nor fixtures (except trade machinery as hereinafter defined) when assigned together with a freehold or leasehold interest in any land or building to which they are affixed, nor growing crops when assigned together with any interest in the land on which they grow*, nor shares or interests in the stock, funds or securities of any government, or in the capital or property of incorporated or joint stock companies, nor choses in action, nor any stock or produce upon any farm or lands which by virtue of any covenant or agreement or of the custom of the country ought not to be removed from any farm where the same are at the time of making or giving of such bill of sale:" and by the 7th section, which should be read together with it, "*No fixtures or growing crops shall be deemed,* [*466] *under * this Act, to be separately assigned or charged*

³ *Union Bank v. Lenanton*, 3 C. P. D. 243, C. A.

⁴ *Ex parte North Western Bank*, 15 Eq. 69; *Ex parte Conning*, 16 Eq. 414; *Merchant Banking Co. v. Spof-*

fen, 11 Ir. R. Eq. 586; *Ex parte Watson*, 5 Ch. D. 35, C. A.

⁵ *Coot v. Jecks*, 13 Eq. 597.

¹ 9 Ch. D. 419.

*by reason only that they are assigned by separate words, or that power is given to sever them from the land or building to which they are affixed, or from the land on which they grow, without otherwise taking possession of or dealing with such land or building, or land, if by the same instrument any freehold or leasehold interest in the land or building to which such fixtures are affixed, or in the land on which such crops grow, is also conveyed or assigned to the same persons or person.”*²

Growing crops were held under the Act of 1854 not to be personal chattels within the meaning of that Act,³ but upon severance the crops became personal chattels, and therefore subject to the provisions of the Act.⁴

A consideration of the case of *Meux v. Jacobs*,⁵ together with the two sections above cited, will show what the words “when separately assigned or charged” were intended to cover.

Trade machinery is dealt with separately by the 5th section, *post*, p. 470, and any mortgage of trade machinery must (it would seem) be registered as a bill of sale, whether it is separately assigned or not.⁶

§ 616. By the 4th section it is further provided, that “Personal chattels shall be deemed to be in the ‘apparent possession’ of the person making or giving a bill of sale, so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person.”

This, with the exception of a slight verbal alteration, is identical with the definition of “apparent possession” given in the 7th section of the Act of 1854.

The 8th section, *post*, p. 472, deals with the effect of goods * comprised in an unregistered bill of sale [*467] remaining in the possession or apparent possession of the grantor.

² This section is made retrospective.

³ *Brantom v. Griffiths*, 2 C. P. D. 212, C. A.; affirmed, s. c. 1 C. P. D. 349.

⁴ *Ex parte National Mercantile Bank*, 16 Ch. D. 104, C. A.

⁵ L. R. 7 H. L. 481.

⁶ As to the law previous to the

The latter words of the clause qualify what precedes them, and therefore if more than formal possession has been taken by the grantee, the clause does not apply.⁷

What is required, in order to constitute a more than formal possession, has not been judicially defined, but in the note *infra*,⁸ will be found some of the cases which have been decided on this head. It is, in general, a question of fact for the jury to decide.

§ 617. A difficulty was felt as to taking more than formal possession of growing crops, and it was laid down in *Sheridan v. Macartney*,¹ that so long as they are upon land occupied by the grantor, they must be in his apparent possession. This case, however, has not met with approval in the English courts,² and in *Ex parte Arnison*³ (which was, however, a case of distress for tithe-rent charge) it was intimated that, after possession of growing crops has once been taken, a notice to inform the public would be sufficient.

Upon the word "occupied" it has been held that actual *de facto* occupation is meant.⁴ If the grantor does not personally occupy the premises, the goods are not in his apparent possession.⁵ Occupation by him as a servant to the grantee is sufficient.⁶ In *Seal v. Claridge*,⁷ the goods were in the grantor's house, of which the grantor possessed a key. He did not sleep there, but went in and out as he pleased. Held, that this amounted to a personal occupation by the grantor, and that the goods were in his apparent possession.

§ 618. Possession by a bailee on behalf of the grantor was held in *Ancona v. Rogers*,¹ to be his possession, al-

Act, see *Mather v. Fraser*, 25 L. J. Ch. 361; *Waterfall v. Penistone*, 6 E. & B. 876, and 26 L. J. Q. B. 100.

⁷ *Gough v. Everard*, 2 H. & C. 12; *Ex parte Lewis*, 6 Ch. 626.

⁸ *Ex parte Jay*, 9 Ch. 697; *Ex parte Homan*, 10 Eq. 63; *Smith v. Wall*, 18 L. T. N. S. 182; *Davies v. Jones*, 10 W. R. 779; *Emmanuel v. Bridger*, L. R. 9 Q. B. 286; *Ancona v. Rogers*, 1 Ex. D. 285, C. A.; *Ex parte Fletcher*, 5 Ch. D. 809, C. A.; *Seal v. Claridge*, 7 Q. B. D. 516, C. A.

¹ 11 Ir. C. L. Rep. 506.

² See remarks by Bramwell B. in *Gough v. Everard*, *ubi supra*, at p. 12, and Brett J. in *Brantom v. Griffiths*, 1 C. P. D. at p. 355.

³ L. R. 3 Ex. 56.

⁴ *Robinson v. Briggs*, L. R. 6 Ex. 1.

⁵ *Gough v. Everard*, *ubi supra*.

⁶ *Pickard v. Marriage*, 1 Ex. D. 364. *Vide ante*, p. 41, § 47, note (15).

⁷ 7 Q. B. D. 516, C. A.

¹ 1 Ex. D. 205, C. A.

though the *grantee had attempted ineffectually, [*468] owing to the refusal of the owner of the house where the goods were, to get access to them. But it is otherwise if the bailee holds on behalf of some third party.²

In *Ex parte Saffery*,³ it was held that goods in the actual visible possession of the sheriff under an execution are not in the apparent possession of the grantor, and the earlier case of *Ex parte Mutton*,⁴ was not followed.

In this connection reference should be made to the doctrine of "reputed ownership" under the Bankruptcy Laws.

By s. 44, sub-s. 3, of the new Bankruptcy Act of 1883 (46 & 47 Vict. c. 52), it is provided that the property of a bankrupt divisible among his creditors shall include *inter alia*:—

"All goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, *in his trade or business*, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business, shall not be deemed goods within the meaning of this section."

This provision replaces the "order and disposition" clause of the Bankruptcy Act of 1869 (32 & 33 Vict. c. 71, s. 15, sub-s. 5), but differs from it in two important particulars:—1. The distinction between traders and non-traders is abolished; the clause applies to all bankrupts alike.⁵ 2. To come within its operation the goods must be in the bankrupt's possession, order, or disposition *in his trade or business*. As regards furniture and other household and domestic goods and chattels not connected with the bankrupt's business, the title of the grantee of the bill of sale will now prevail against the trustee in bankruptcy.⁶

² *Market Banking Co. v. Spoffen*, 11 Ir. R. Eq. 587.

³ 16 Ch. D. 668, C. A.

⁴ 14 Eq. 178.

⁵ Farmers, graziers and others

were excluded from the operation of the clause in the Act of 1869.

⁶ See *Ex parte Lovering*, 24 Ch. D. 31, C. A., as to the evidence required to connect goods with the business.

The Bills of Sale Act, 1854, contained no provision [*469] with *regard to goods in the possession of a bankrupt, and it was decided under that Act that where the grantor was a trader, goods comprised in a bill of sale, even although registered, remained until demand in his order and disposition, and in the event of his bankruptcy vested in his trustee.

The Act of 1878 made an important alteration in the existing law by providing (s. 20) that “*chattels comprised in a bill of sale which has been and continues to be duly registered under this Act shall not be deemed to be in the possession, order, or disposition of the grantor of the bill of sale within the meaning of the Bankruptcy Act, 1869.*”

§ 619. Then came the Act of 1882 expressly repealing (s. 15) the above section, and reviving, so far as relates to bills of sale given by way of security, the doctrine of reputed ownership. The effect of this is to restore the authority of the cases decided previous to 1879, the most important of which are given in the note.¹

§ 620. The following are the chief points of distinction between the doctrine of “reputed ownership” under the Bankruptcy Act, 1883, and that of apparent possession under the Bills of Sale Acts, 1878 and 1882,¹ keeping in view the important effect of s. 15 of the Act of 1882 upon the latter doctrine:

1. Under the reputed ownership clause it is necessary that the true owner should consent, and a demand of the goods by him excludes its application: in the case of apparent possession his consent is immaterial, and an actual and not a merely attempted possession on his part is necessary.²

2. The only person who is favored by “reputed ownership” is the trustee in bankruptcy or liquidation, whereas

¹ Freshney v. Carrick, 1 H. & N. 653; Reynolds v. Hall, 4 H. & N. 519; Badger v. Shaw, 2 E. & E. 472; Stansfield v. Cubitt, 2 De G. & J. 222; Spackman v. Miller, 12 C. B. N. S. 659; *Ex parte Harding*, 15 Eq. 223.

¹ Based upon Williams on Bankruptcy, p. 123, ed. 176. The alterations occasioned by the Bills of Sale Act, 1875, and the Bankruptcy Act, 1883, are taken into consideration.

² See *Ancona v. Rogers*, 1 Ex. D. 285 C. A.

any unregistered bill of sale, to which the doctrine of apparent possession applies, is also void as against an execution creditor.

*3. Reputed ownership applies to personal chat- [*470] tels incapable of complete transfer by delivery, *e.g.* shares, stocks and trade debts; whereas the Bills of Sale Acts do not.

4. Reputed ownership does not apply to fixtures, including within that definition trade machinery, whereas the Bills of Sale Acts apply to trade machinery in all cases, and also to other fixtures "when they are separately assigned or charged."

5. Reputed ownership applies, although the goods are neither in the possession nor the apparent possession of the bankrupt, whereas by the Bills of Sale Acts they must be in the grantor's possession or apparent possession.

6. Reputed ownership does not apply when the goods come into the bankrupt's possession after the commencement of the bankruptcy, whereas the words in the Bills of Sale Act, 1878, are "at *or after* the time of filing the petition for bankruptcy."

The combined effect of ss. 8 and 15 of the Bills of Sale Act, 1882, which is to render absolutely void unregistered bills of sale given by way of security, makes an inroad upon the doctrine of apparent possession; but it having been settled that the repeal contained in s. 15 is limited in its operation to that class of bills of sale³ the doctrine remains in force with regard to unregistered bills of sale given by way of absolute transfer, and with regard to unregistered bills of sale given by way of security and executed before the 1st of November, 1882. On the other hand, the doctrine of reputed ownership, which alone applies to bills of sale given by way of security, and registered after that date, is under the "order and disposition" clause of the new Bankruptcy Act limited in its application to bills of sale given over goods which, at the time of the grantor's bankruptcy, are in his possession in his trade or business.⁴

³ *Swift v. Pannell*, 24 Ch. D. 210;
Reeves v. Barlow, 11 Q. B. D. 610.

⁴ See *Ex parte Lovering*, 24 Ch. D.
31, C. A.

§ 621. By the 5th section, "*Trade machinery shall, for the purposes of this Act, be deemed to be personal chattels, and any mode of disposition of trade machinery by the owner thereof which would be a bill of sale as to any other personal chattels shall be deemed to be a bill of sale within the meaning of this Act.*"

[*471] * The section proceeds to define what is comprised within the term "trade machinery"; as to which, see *ante*, p. 466.

The limiting words, "for the purposes of this Act," are important. Independently of the Act fixed trade machinery is not goods and chattels, and, therefore, not within the doctrine of reputed ownership under the Bankruptcy Act.

§ 622. By the 6th section, "*Every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any present, future, or contingent debt or advance, and whereby any rent is reserved or made payable as a mode of providing for the payment of interest on such debt or advance, or otherwise for the purpose of such security only, shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress. Provided, that nothing in this section shall extend to any mortgage of any estate or interest in any land, tenement, or hereditament which the mortgagee, being in possession, shall have demised to the mortgagor as his tenant at a fair and reasonable rent.*"

An attornment clause was not uncommonly inserted in mortgage deeds, and it was until lately generally supposed that a mortgagee might avail himself of such a clause without incurring the responsibilities of a mortgagee in possession. But from recent decisions¹ it appears that under an attornment clause the mortgagee is under the same liability to account as a mortgagee in possession would have been.

Recent cases in which the effect of an attornment clause was discussed are referred to in the note.²

¹ In *re* Stockton Iron Co., 10 Ch. D. 335, C. A.; *per* James L. J. p. 356; *per* Bramwell L. J. p. 357; *Ex parte* Punnett, 16 Ch. D. 226, C. A.; *per* Jessel M. R. p. 235.

² In *re* Stockton Iron Co., *ubi*

These cases arose under deeds executed before the Act of 1878, and were decided under the 34th section of the Bankruptcy Act, 1869, which empowers a landlord to distrain for one year's rent accrued due prior to the date of the order of adjudication. In the case of *In re Stockton Iron Company*,¹ it was held that the clause was not a "licence or authority to * take possession of chattels" within the [*472] Bills of Sale Act, 1854. But now, under this section, every mortgage deed containing an attornment clause must be registered, in order to render that clause valid as against the trustee in bankruptcy or the execution creditor.³

In *Ex parte Harrison*,⁴ it was held, by the Court of Appeal, that the proceeds of distress for rent levied under an attornment clause are, in the absence of any provision in the deed to the contrary, applicable to payment of principal as well as of interest.

§ 623. By the 8th section, "Every bill of sale to which this Act applies shall be *duly attested*, and shall be registered under this Act within *seven* days after the making or giving thereof, *and shall set forth the consideration for which such bill of sale was given*, otherwise such bill of sale, as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in such bill of sale under the law relating to bankruptcy or liquidation, or under any assignment for the benefit of the creditors of such person, and also as against all sheriffs' officers and other persons seizing any chattels comprised in such bill of sale, in the execution of any process of any Court authorizing the seizure of the chattels of the person by whom or of whose chattels such bill has been made, and also as against every person on whose behalf such process shall have been issued, shall be deemed fraudulent and void so far as regards the property in or right to the possession of any chattels comprised in

supra; *Ex parte Jackson*, 14 Ch. D. 725, C. A.; and see *Ex parte Punnett*, *ubi supra*; *Ex parte Isherwood*, 46 L. T. N. S. 539; and *Ex parte Williams*, 7 Ch. D. 138, C. A.

³ *Per* Baggallay L. J. in *Ex parte Jackson*, 14 Ch. D. at p. 733; Robson on Bankruptcy, 543, Ed. 1881.

⁴ 18 Ch. D. 127, C. A. where *Hampson v. Fellows*, 6 Eq. 575, was not followed.

such bill of sale which, at or after the time of *filing the petition for bankruptcy or liquidation*, or of the execution of such assignment, or of executing such process (as the case may be), and after the expiration of such seven days, are in the possession or apparent possession of the person making such bill of sale (or of any person against whom the process has issued under or in the execution of which such bill has been made or given, as the case may be").

The 15th section of the Act of 1882 repeals this section.

The 8th section of the same Act is a substantial re-
[*473] enactment * of it, but contains this further important provision, that bills of sale to which the Act applies will, on failure to comply with the requisites as to attestation, registration, and statement of consideration, be rendered absolutely void. The extent and effect of this repeal is noticed, *post*, p. 487.

Under the Act of 1854 attestation was unnecessary.

As to the mode of attestation required by the Act of 1878, see *post*, p. 479.

§ 624. There are four classes of persons as against whom an unregistered bill of sale is by this section declared to be void —

- 1st. The grantor's trustee in bankruptcy or insolvency;
- 2d. His assignees in any assignment for the benefit of creditors;
- 3d. Sheriffs' officers and others seizing under execution; and
- 4th. All persons in whose behalf process of execution has issued.

The liquidator of a company is not comprehended in these provisions as being an assignee in bankruptcy or insolvency,¹ because he acts not only for creditors but for contributories and for the company.

The rule in bankruptcy contained in this section is not applicable under the 10th section of the Judicature Act, 1875, to the case of the administration by the Court of an

¹ *Re Marine Mansions Co.*, 4 Eq. 601.

insolvent's estate.² The principle of the decisions is that the 10th section of the Judicature Act, whilst introducing new rules for the administration of assets, does not enlarge or diminish the assets to be administered.

The new provision as to setting forth the consideration for the bill of sale has already given occasion for numerous decisions which are not at all reconcilable, and some of the earlier of which do not seem now to retain much authority.

The cases decided on this point are now referred to in order of date.

§ 625. *In *Ex parte Carter*,¹ where the bill of [*474] sale recited in effect that 400*l.*, the amount of the consideration, had been advanced to the grantor, whereas in fact 240*l.* was advanced to the grantor and his partner jointly, and the dates of the several advances were also misrecited, it was held by the Chief Judge that, although the transaction was an honest one, the consideration was not truly stated, and the bill of sale void.

In *Hamlyn v. Betteley*,² where the statement of the consideration was "the sum of 182*l.* 3*s.* now paid by the grantee to the grantor," and that sum was paid at the grantor's request, partly to pay out executions on the grantor's goods, partly to the attesting solicitor for money lent and costs due to him from the grantor, and the balance in cash to the grantor, it was held that the statement of the consideration was sufficient in the absence of any suggestion of fraud.

In *Ex parte National Mercantile Bank*,³ it was held, by the Court of Appeal, that a collateral agreement between the grantor and the grantee as to the application of the consideration does not require to be stated.

§ 626. In *Ex parte Charing Cross Advance and Deposit Bank*,¹ the consideration was stated in the operative part of

² *Re Knott*, 7 Ch. D. 549, note; *Re D'Epineuil*, 20 Ch. D. 217. See, also, *per James L. J.* in *Re Withernsea Brickworks Co.*, 16 Ch. D. 337, C. A. at p. 341, where he points out the limitation to be put upon the 10th section of the Judicature Act.

¹ 12 Ch. D. 908. The decision is questioned by Baggallay L. J. in *Ex parte National Mercantile Bank*, 15 Ch. D. at p. 55.

² 5 C. P. D. 327.

³ 15 Ch. D. 42, C. A.

¹ 16 Ch. D. 35, C. A.

the bill of sale as 120*l.* In fact, 90*l.* was paid to the grantor, 30*l.* being retained by the grantee for interest and expenses. At the foot and after the attestation clause there was a receipt setting forth the actual facts. It was held, that the receipt was not part of the deed, and that the consideration was not truly set forth therein. *Ex parte* National Mercantile Bank was distinguished upon the ground that in that case there was a *bonâ fide* debt existing, independently of and previous to the transaction of loan.

In *Carrard v. Meek*,² the bill of sale was expressed to be "in consideration of the payment of 81*l.* 18*s.* by the grantee to the grantor, and in further consideration of 16*l.* 3*s.* [*475] by the *grantee to the sheriff of Surrey for and at the request of the grantor." The former sum was a past payment and the latter a present payment to discharge an execution. Held, that the consideration was sufficiently set forth.

§ 627. In *Ex parte Berwick*,¹ the consideration for a bill of sale dated the 4th of June, 1879, was stated to be the "sum of 65*l.* now paid" by the grantee to the grantor. The 65*l.* was in fact advanced by instalments, the first of which was on the 16th of April, 1877, and the last on the 16th of October, 1878. It was held by the Chief Judge in Bankruptcy that the consideration was not truly stated.

In *Ex parte Challinor*,² it was held that the bill of sale was not vitiated because a part of the sum stated as the consideration was retained by the grantee to pay the costs of the solicitor in the preparation of the deed and of the auctioneer for the valuation of the property. *Ex parte* Charing Cross Bank was distinguished upon the ground that there a sum was colorably retained for interest when no interest could have been due at the time.

But in *Hamilton v. Chaine*,³ where there was a deduction for commission upon the loan, and the statement of the consideration was the whole amount of the loan without

² 50 L. J. Q. B. 187; 29 W. R. 244.

¹ 43 L. T. N. S. 576; 29 W. R. 292, *sed quære*.

² 16 Ch. D. 260, C. A. But see *Ex parte Firth*, *infra*.

³ 7 Q. B. D. 319, C. A., affirming s. c. *ib.* 1.

deducting the commission, the Court of Appeal held that the consideration was not truly stated, and *Ex parte National Mercantile Bank* and *Ex parte Challinor* were distinguished; at the same time Brett and Cotton L. JJ. expressed a doubt as to the correctness of those decisions.

§ 628. In the *Credit Company v. Pott*¹ it was held that the consideration for a bill of sale had been truly set forth, where upon a statement of accounts it was found that the grantor was indebted to the grantee to the amount of £7,350, and the bill of sale recited that the grantee had *agreed to lend* £7,350 to the grantor, and the consideration was stated to be £7,350 *then* paid by the grantee to the grantor.

* In *Ex parte Winter*,² the bill of sale recited that [*476] the mortgagor was indebted to the mortgagee in the sum of 1,444*l.* 14*s.* 3*d.*, and that the mortgagor had agreed to execute the mortgage deed in order to induce the mortgagee not to institute proceedings. The facts were that a few days previous to the execution of the bill of sale the mortgagee had given the mortgagor a cheque for the full amount, but on hearing rumors as to the mortgagor's insolvency, stopped payment of it at the bank. Two days later the stop was withdrawn on the distinct understanding that good security should be given, and the cheque was accordingly paid a few hours prior to the execution of the bill of sale, but no proceedings had been threatened by the mortgagee. Held, that the consideration was properly set forth.

Jessel M. R. said: "I wish to add that a small inaccuracy in the statement of the consideration will not be sufficient to avoid a bill of sale, otherwise valid. That Act was never intended to defraud creditors. Substantial accuracy is sufficient to satisfy its requirements."

§ 629. In *Ex parte Rolph*,¹ where out of an ostensible consideration of £50 the sum of £25 had been retained by the grantee under an agreement with the grantor to apply it in payment of the *future* rent of the grantor's house, the

¹ 6 Q. B. D. 295, C. A., aff. s. c. reported *sub nom.* *Ex parte Ord*, 43 L. T. N. S. 592. L. T. N. S. 637.

² 44 L. T. N. S. 323, C. A., aff. s. c. ¹ 19 Ch. D. 98, C. A.

agreement being made with a view to better the grantee's security, the Court of Appeal held that the consideration was not truly stated, and *Ex parte National Mercantile Bank* and *Ex parte Challinor* were explained and distinguished.

Finally, in *Ex parte Firth*,² the same Court held that the consideration was not truly stated when a small sum was retained by the grantee for the expenses attending the attestation of the deed, on the principle that the costs were not an *actual debt* of the borrower, until after the transaction was completed. The result is, that the earlier decisions of the Court in *Ex parte National Mercantile Bank* and *Ex parte Challinor* are only binding authorities for the [*477] future in *cases which come within the principle laid down in *Ex parte Firth*, and which was enunciated by James L. J. in *Ex parte Challinor*³ as forming the ground of those decisions.⁴

§ 630. The following rules may be extracted from the foregoing decisions:—

1. The first question to determine in every case is, whether the consideration stated in the bill of sale is in substance and in truth the consideration received by the grantor, or whether the statement is a merely colorable one, rendering the bill of sale void as a sham transaction, and a small inaccuracy will not be sufficient to avoid a bill of sale otherwise valid.¹

2. In the absence of fraud it is not essential that the consideration stated to be paid should pass from the grantee to the grantor at the time of the execution of the bill of sale. The grantee may retain the whole or deduct a part of the amount stated in satisfaction of a pre-existing debt due to himself from the grantor,² or may apply it, with the consent

² 19 Ch. D. 419, C. A. Another decision, only reported while this work was passing through the press, is *Ex parte Popplewell*, 21 Ch. D. 73, C. A.

³ 16 Ch. D. at p. 266.

⁴ See *per Brett L. J.* in *Ex parte Firth*, 19 Ch. D. at p. 430, and *per Jessel M. R.* at p. 428.

¹ *Ex parte National Mercantile Bank*, 15 Ch. D. 42, C. A.; *Ex parte Charing Cross Bank*, 16 Ch. D. 35, C. A.; *Ex parte Challinor*, *ibid.* 260, C. A.; *Ex parte Winter*, 44 L. T. N. S. 323, C. A.; and see *Collis v. Tuson*, 46 L. T. N. S. 387.

² *Credit Co. v. Pott*, 6 Q. B. D. 295; *Carrard v. Meek*, 50 L. J. Q. B. 187.

and by the direction of the grantor, in discharge of debts actually due from the grantor to third persons.³

3. A collateral agreement as to the application of the consideration does not require to be set out in the bill of sale.⁴

4. The retention of a part of the consideration stated to meet debts of the grantor to accrue due after the date of the execution of the bill of sale, either to third persons or to the grantee, as interest on his loan, will invalidate the bill of sale.⁵

5. The expenses incurred in the preparation of the bill of sale, not being a debt actually due from [*478] the grantor at the time of the execution of the bill of sale, the grantee is not entitled to deduct them from the amount of the consideration stated to be paid.⁶

§ 631. By the 9th section, “ *Where a subsequent bill of sale is executed within or on the expiration of seven days after the execution of a prior unregistered bill of sale, and comprises all or any part of the personal chattels comprised in such prior bill of sale, then, if such subsequent bill of sale is given as a security for the same debt as is secured by the prior bill of sale, or for any part of such debt, it shall to the extent to which it is a security for the same debt or part thereof, and so far as respects the personal chattels or part thereof comprised in the prior bill, be absolutely void, unless it is proved to the satisfaction of the Court having cognizance of the case that the subsequent bill of sale was bonâ fide given for the purpose of correcting some material error in the prior bill of sale, and not for the purpose of evading this Act.*”

Under the earlier Act the practice extensively prevailed of executing successive bills of sale, each within the twenty-one days then allowed for registration, the effect being that the security remained valid, and at the same time the bill of sale

³ *Hamlyn v. Betteley*, 5 C. P. D. 327; *Carrard v. Meek*, *ubi supra*; *Ex parte Firth*, 19 Ch. D. 419, C. A.; *Ex parte Berwick*, 43 L. T. N. S. 576; 29 W. R. 292, seems to be inconsistent with these decisions.

⁴ *Ex parte National Mercantile Bank*, 15 Ch. D. 42, C. A.; but *quære*,

as to the authority now of this decision.

⁵ *Ex parte Charing Cross Bank*, 16 Ch. D. 35, C. A.; *Ex parte Rolph*, 19 Ch. D. 98, C. A.

⁶ *Ex parte Firth*, *ubi supra*, practically overruling on this point *Ex parte Challinor*, 16 Ch. D. 260, C. A.

was kept off the register. The object of the section is to check this practice.¹

In bankruptcy these contrivances had been held invalid as a fraud on the bankruptcy laws.²

This section does not affect a subsequent bill of sale executed after the expiration of the seven days.³

§ 632. By the 10th section, "A bill of sale shall be attested and registered under this Act in the following manner :

(1.) *The execution of every bill of sale shall be attested by a solicitor of the Supreme Court, and the attestation shall state that before the execution of the bill of*
[*479] *sale *the effect thereof has been explained to the grantor by the attesting solicitor.*¹

(2.) Such bill, with every schedule or inventory thereto annexed or therein referred to, *and also* a true copy of such bill and of every such schedule or inventory, and of every attestation of the execution of such bill of sale, together with an affidavit of the time of such bill of sale being made or given, *and of its due execution and attestation*, and a description of the residence and occupation of the person making or giving the same (or in case the same is made or given by any person under or in the execution of any process, then a description of the residence and occupation of the person against whom such process issued), and of every attesting witness to such bill of sale, shall be presented to and the said copy and affidavit shall be filed with the registrar within *seven* clear days after the making or giving of such bill of sale, in like manner as a warrant of attorney in any personal action given by a trader is now by law required to be filed."

¹ See the law as laid down in *Smale v. Burr*, L. R. 8 C. P. 64, and confirmed by the Ex. Ch. in *Ramsden v. Lupton*, L. R. 9 Q. B. 17.

² *Ex parte Stevens*, 20 Eq. 786; *Ex parte Furber*, 6 Ch. D. 181.

³ *Carrard v. Meek*, 50 L. J. Q. B. 187; 29 W. R. 244.

¹ Repealed by the 10th section of the Act of 1882.

Under the Act of 1854 attestation was unnecessary.

§ 633. The 8th section of this Act provides that the bill of sale shall be "duly attested," and the 10th section (subsect. 1) explains due attestation to be an attestation by a solicitor of the Supreme Court; and (sub-sect. 2) contains the requisites for valid registration, and provides that the bill of sale, and a copy together with an affidavit of the "due execution and attestation" of the bill of sale, shall be filed.

It was decided under this Act that want of attestation did not render the bill of sale void as between grantor and grantee;¹ but the 8th section of the Act of 1882 now renders all bills of sale to which the Act applies absolutely void (*post*, p. 488).

Under the Act of 1878 it had been held that the solicitor acting for both parties was a competent attesting witness,² * and so was the solicitor acting for the [*480] grantee;³ but that the grantee himself, although a solicitor, could not be the attesting witness.⁴

As to the explanation, it had been decided that though the attestation clause must state that the bill of sale had been explained to the grantor by the attesting solicitor, yet no such explanation need in fact have been given, and its omission would not invalidate the bill of sale.⁵

The effect of these decisions was to render the provisions of the 1st sub-section practically valueless, and it is now formally repealed by the 10th section of the Act of 1882.

The affidavit of "due execution and attestation," filed with the bill of sale, must state that the bill of sale was duly attested, *i.e.*, that the attesting witness was present and witnessed its execution. A mere verification of the signature of the witness to the attestation clause is defective and will invalidate the registration.⁶ These decisions are still of

¹ *Davis v. Goodman*, 5 C. P. D. 128, C. A., overruling *s. c.* *ibid.* 20.

² *Vernon v. Cooke*, 49 L. J. C. P. 767.

³ *Penwarden v. Roberts*, 9 Q. B. D. 137.

⁴ *Seal v. Claridge*, 7 Q. B. D. 516,

C. A., following upon this point *Freshfield v. Reed*, 9 M. & W. 404.

⁵ *Ex parte National Mercantile Bank*, 15 Ch. D. 42, C. A.; and see *Hill v. Kirkwood*, 28 W. R. 358, C. A.

⁶ *Sharpe v. Birch*, 8 Q. B. D. 111; *Ex parte Knightley*, 46 L. T. N. S.

importance with regard to all bills of sale registered before the 1st of November, 1882, and possibly with regard to absolute bills of sale (to which the new Act does not apply) registered after that date.

§ 634. With respect to the description of the residence and occupation of the grantor, the decisions under the statutes have established that the objects of the forms and requisites prescribed was to afford to creditors and parties interested a true idea of the position in life of the grantor, and to give such a description of the residence and occupation of the grantor and witnesses as would enable persons interested in the matter to trace out who is the person giving the bill of sale, and who the witnesses are, so as to ascertain the bona fides of the transaction.¹

[*481] * Any misdescription or non-description in these particulars will therefore vitiate the bill of sale.

Among the very numerous cases which have been decided on this point the following are selected as fair examples:—

It has been held insufficient to describe as “gentleman” only a clerk in the Audit office,² or an attorney’s clerk,³ or a silk buyer.⁴

But such a description was held sufficient where the party had no occupation.⁵

§ 635. How far the bill of sale may be read together with the affidavit in order to supply omissions or deficiencies in the latter is a question not from difficulty.

776; *Ford v. Kettle*, 9 Q. B. D. 139, C. A.

¹ *Per* Wightman J. in *Hewer v. Cox*, 3 E. & E. at p. 433; *per* Blackburn J., *ibid.* p. 436; *per eundem* in *Briggs v. Boss*, L. R. 3 Q. B. 268–279; *per eundem* in *Larchin v. North Western Deposit Bank*, L. R. 10 Ex. 64; *per* Coleridge C. J. in *Murray v. Mackenzie*, L. R. 10 C. P. at p. 628; *per* Cockburn C. J. in *Jones v. Harris*, L. R. 7 Q. B. at p. 160.

² *Allen v. Thompson*, 1 H. & N. 15; 25 L. J. Ex. 249.

³ *Tuton v. Sanoner*, 3 H. & N. 280;

27 L. J. Ex. 293; *Beales v. Tennent*, 29 L. J. Q. B. 188.

⁴ *Adams v. Graham*, 33 L. J. Q. B. 71.

⁵ *Morewood v. South Yorkshire Railway Co.*, 3 H. & N. 798; 28 L. J. Ex. 114; *Sutton v. Bath*, 3 H. & N. 382; 27 L. J. Ex. 388; *Nicholson v. Cooper*, 3 H. & N. 384; *London Loan Co. v. Chace*, 12 C. B. N. S. 730; 31 L. J. C. P. 314; *Grant v. Shaw*, L. R. 7 Q. B. 700; *Broderick v. Scalé*, L. R. 6 C. P. 98; *Smith v. Cheese*, 1 C. P. D. 60; *Castle v. Downton*, 5 C. P. D. 56; *Ex parte Wolfe*, 44 L. T. N. S.

As a general rule the description of the grantor's residence and occupation should be repeated in the affidavit.

In *Hatton v. English*,¹ the bill of sale gave a complete description of the residence and occupation of the grantor, but the affidavit contained no description of his occupation and no reference (apparently) to the description given in the bill of sale; held that it was necessary that the description should be filed along with the bill of sale, and that the fact that the bill of sale contained it was not a compliance with the statute.

In *Pickard v. Bretts*,² the affidavit described the grantor as "the said J. B., of No 9, George Street, in the said bill of sale mentioned," but omitted his occupation of hotel-keeper. . The bill of sale accurately described his residence and occupation, but there was nothing in the affidavit which **verified* the description given in the bill of [*482] sale; held that the bill of sale could not be referred to in order to supply the want of any description of his occupation in the affidavit.

But in *Jones v. Harris*,³ where the residence was incompletely but accurately stated in the affidavit as "Dynevor Lodge," and was completely stated in the bill of sale as "Dynevor Lodge in the parish of Llanarthney, in the county of Caermarthen," it was held that the ambiguity arising from the incompleteness of the affidavit might be cured by reference to the bill of sale.

The question of sufficiency is always one of degree, and as was said by Blackburn J. in *Jones v. Harris*,⁴ "Chatsworth" would be a sufficient description of the residence of the Duke of Devonshire, and possibly "Scotland" of the Duke of Buccleuch.

The general rule, therefore, seems to be modified to this extent that it is allowable by a reference to the bill of sale to supplement the description given, but not to supply a description omitted, in the affidavit.

321; aff. *sub nom.* *Ex parte Chapman*, 45 L. T. N. S. 265, C. A.

¹ 7 E. & B. 94; 26 L. J. Q. B. 161.

² 5 H. & N. 9; 29 L. J. Ex. 18.

³ L. R. 7 Q. B. 157.

⁴ L. R. 7 Q. B. at p. 164.

A variance, however, between the description given in the bill of sale and that given in the affidavit is fatal.⁵

§ 636. The residence of the witness has been held sufficiently indicated by giving his place of business, without describing the place where he sleeps,¹ or conversely by giving his private abode without his place of business.²

A residence described as "New Street, Blackfriars, in the county of Middlesex," without adding the "city of London," was held sufficient,³ and so was a residence described as "in the county of Chester," which was in fact situate within the county of the city of Chester.⁴ And in *Briggs v.*

[*483] *Boss*,⁵ the attesting witness stated: "I reside at * Hanley, in the county of Stafford, and am an accountant," and this was held sufficient both as to residence and occupation, although it was proven that Hanley was a borough containing 40,000 inhabitants, and although the deponent was a clerk of an accountant residing in Manchester, whose name was over the door of the place of business in Hanley; these facts being overcome by proof, first, that hundreds of letters reached the deponent addressed Hanley only: and, secondly, that although he was only a clerk at Hanley for the Manchester accountant, he was allowed by his employer to do business occasionally on his own account: but in a later case before the Queen's Bench the same description "accountant" was held to be an insufficient description of the occupation of a clerk in the accountant's department at Euston Station, although he worked for other people after office hours, in bookkeeping and matters of account, and the Court characterized *Briggs v. Boss* as an extreme decision.⁶

⁵ *Murray v. Mackenzie*, L. R. 10 C. P. 625.

¹ *Attenborough v. Thompson*, 2 H. & N. 559; 27 L. J. Ex. 23; *Blackwell v. England*, 8 E. & B. 56; 27 L. J. Q. B. 124.

² *Yardley v. Jones*, 4 Dowl. P. C. 45, *sed quære*.

³ *Hewer v. Cox*, 3 E. & E. 428; 30 L. J. Q. B. 78.

⁴ *Ex parte M'Hattie*, 10 Ch. D. 398, C. A.

⁵ L. R. 3 Q. B. 268; 37 L. J. Q. B. 101. See, also, *Blackwell v. England*, 8 E. & B. 541; 27 L. J. Q. B. 124; *Re Hams*, 10 Ir. Ch. Rep. 100; 1 L. T. N. S. 467.

⁶ *Larchin v. North Western Deposit Bank*, L. R. 10 Ex. 64.

An affidavit describing the grantor's residence and occupation to the "best of the belief" of the witness, was held sufficient by the Exchequer of Pleas, in *Roe v. Bradshaw*.⁷

§ 637. In *Shears v. Jacobs*,¹ it was held that a trading company is competent to give a bill of sale, and that an affidavit describing the company as "The Glucose Sugar and Coloring Company," and giving the address of its principal office, was a sufficient compliance with the Act.

It was further held in this case and in *Deffell v. White*,² that directors attesting the seal of the company were not witnesses within the meaning of the Act whose residences it is necessary to state.

The description of the residence and occupation of the grantor required is the description of such residence and occupation at the date of the affidavit, and not at the time of making or giving the bill of sale.³

* There is nothing in the Act which necessitates [*484] the name of the grantor being correctly given, so far as regards the validity of the registration. It is sufficient if he can be identified from the name, residence and occupation given, and an error in the christian name is of no importance.⁴

§ 638. In *Marples v. Hartley*,¹ decided under the Act of 1854, the facts were that a bill of sale was given on the 27th of June, and a creditor's execution levied on the 5th of July, within the twenty-one days then allowed for registration. The grantee did not register at all. Held that his title under the bill of sale was good: the Court declaring that "two things are required before the requirements of the statute need be complied with: the apparent possession of the goods and the lapse of the twenty-one days. The as-

⁷ L. R. 1 Ex. 106; 35 L. J. Ex. 71.

¹ L. R. 1 C. P. 513; 35 L. J. C. P. 241.

² L. R. 2 C. P. 144.

³ *Button v. O'Neill*, 4 C. P. D. 854, C. A., dissenting from London and Westminster Loan Co. v. Chase,

12 C. B. N. S. 730; but see *Ex parte Kahen*, 46 L. T. N. S. 856.

⁴ *Ex parte M'Hattie*, 10 Ch. D. 398, C. A.

¹ 1 B. & S. 1; 30 L. J. Q. B. 92; see also *Banbury v. White*, 2 H. & C. 300; 31 L. J. Ex. 258; and *Ex parte Kahen*, *supra*.

signee has the period of twenty-one days within which he may complete his title by registering the bill of sale: but if he takes possession under it in the meantime, he need not register at all. Here, it was not invalidated at the time the goods were received by the sheriff. It therefore gave the claimant a good title to the goods till he had so seized them or had registered it within the twenty-one days."

The principle of this decision would now apply under the Acts of 1878 and 1882, substituting seven for twenty-one days.

§ 639. By the 10th section (sub-s. 3): "If the bill of sale is made or given subject to any defeasance or condition, or declaration of trust not contained in the body thereof, such defeasance, condition, or declaration shall be deemed to be part of the bill, and shall be written on the same paper or parchment therewith before the registration, and shall be truly set forth in the copy filed under this Act therewith and as part thereof, otherwise the registration shall be void."

This provision is substantially the same as that contained in the 2d section of the Act of 1854.

[*485] * In *Robinson v. Collingwood*,¹ it was held under the Act of 1854 that the section applied only to declarations of trust between the grantor and the grantee, not to one between the grantee and a stranger to the grantor.

In *Ex parte Southam*,² it was held that a prior parol agreement not appearing in the bill of sale, by which the debt was to be paid off by small weekly instalments, amounted to a defeasance or condition within the meaning of the section, and must be registered.

§ 640. Further, by the 10th section, "*In case two or more bills of sale are given, comprising in whole or in part any of the same chattels, they shall have priority in the order of the date of their registration respectively as regards such chattels,*" and "a transfer or assignment of a registered bill of sale need not be registered."

It has now been decided by the Court of Appeal in *Conelly*

¹ 17 C. B. N. S. 777; 34 L. J. Collins, 10 Ch. 367; *Ex parte Odell*, 10 Ch. D. 76, C. A.; *Ex parte Poplewell*, 21 Ch. D. 78, C. A.

² 17 Eq. 578. See, also, *Ex parte*

*v. Steer*¹ in opposition to *Lyons v. Tucker*,² that priority is given by registration whether or not bankruptcy or execution has supervened. In other words, this clause must be read not with, but independently of, the 8th section. The effect, therefore, of the clause is to alter the law as laid down in *Meux v. Jacobs*,³ and other cases which followed that decision.

Whether the holder of a second bill of sale will lose the priority given by registration, if he has had notice of a prior unregistered bill of sale at the time when he advanced his money, according to the doctrine of *Le Neve v. Le Neve*,⁴ has not yet been decided.

* The reader, however, is referred to *Edwards v. Edwards*,⁵ where it was held that the fact that an execution creditor was at the time when his debt was contracted aware that his debtor had given a bill of sale, did not prevent his availing himself of the objection that it had not been registered. The principle of that decision, as expressed by James and Mellish L. JJ., is that it would be dangerous to engraft an equitable exception upon a modern Act of Parliament.

On the other hand, in *Graves v. Tofield*,⁶ to the decision in which James L. J. was a party, an annuity deed not registered under 18 & 19 Vict. c. 15, s. 12, was held valid as against all subsequent encumbrancers who took with notice of the annuities. *Edwards v. Edwards* was not cited, but the principle of the decision in *Graves v. Tofield* was that the wording of the section was similar to that employed in the old Registry Acts, under which notice had been held fatal to the subsequent registered encumbrancers, and that therefore the legislature must be taken to have used the

¹ 7 Q. B. D. 520, C. A.

² 6 Q. B. D. 660, where all the previous cases are discussed by Lindley J. After the decision of the Court of Appeal in *Conelly v. Steer*, the case was reversed, 7 Q. B. D. 523, C. A.

³ L. R. 7 H. L. 481. See, also, *Richards v. James*, L. R. 2 Q. B.

285; *Edwards v. English*, 7 E. & B. 564; *Ex parte Cochrane*, 3 Ch. D. 324; s. c. 4 Ch. D. 23, C. A.; *Ex parte Payne*, 11 Ch. D. 539.

⁴ 2 W. & T. L. C. in Eq. 32, ed. 1877.

⁵ 2 Ch. D. 291, C. A.; Maxwell on Statutes, 233, ed. 1875.

⁶ 14 Ch. D. 563, C. A.

words in the later Act in the sense given to them by the decisions under the earlier Acts, otherwise they would have used the words "any notice notwithstanding," which appear in some of the other sections.

It is therefore submitted that notice of the existence of a prior unregistered bill of sale would not, under this section, prejudice the title of a second bill of sale holder who had duly registered.

As to a transfer of a registered bill of sale, see *Horne v. Hughes*.⁷

§ 641. By the 11th section, "The registration of a bill of sale must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be), the registration shall become void."

This section is retrospective.

It has been decided that the registration must [*487] be renewed * within the required period, although in the meantime the bill of sale has been transferred to a third person, and the assignee, if the registration is not renewed, has no title as against an execution creditor.¹

§ 642. The Bills of Sale Act (1878) Amendment Act, 1882, which is to be construed, so far as is consistent with its tenor, as one with the Act of 1878, therein called "the principal Act," came into operation on the 1st of November, 1882.

The Act, *unless the context otherwise requires*, is not to apply to any bill of sale duly registered before that date, so long as the registration is not avoided by non-renewal or otherwise. The provision, however contained in sect. 13, which requires an interval of five clear days before the removal or sale of goods seized under a bill of sale is expressly retrospective, and that contained in sect. 7 for an application and order to restrain such removal or sale has

⁷ 6 Q. B. D. 676, C. A.

¹ *Karet v. Kasher Meat Supply Association*, 2 Q. B. D. 361.

been held to be impliedly so,¹ but in other respects the Act is not retrospective. It applies only to bills of sale *given by way of security for the payment of money*—a very important limitation—and is not to apply to any debentures issued by any mortgage loan or other incorporated company, and secured upon the company's capital, stock, or goods, chattels and effects (sect. 17). The 10th and 15th sections of the Act expressly repeal the 8th and 20th sections, and a portion of the 10th section of the Act of 1878, as well as any provisions of the earlier Act, which are inconsistent with those of the later; but the effect of the 3d section being to limit the scope and operation of the Act to bills of sale given by way of security, the appeal is confined in its application to that class of bills of sale, leaving bills of sale, given by way of absolute transfer, subject to all the provisions of the Act of 1878.² This is a result * which probably [*488] the Legislature did not contemplate, but one which, if so minded, it might have easily avoided, by expressly providing that the repealing sections should have a general application. It follows from this construction of the Act that goods comprised in a bill of sale, registered under the Act of 1882, and given by way of absolute transfer, are not in the order and disposition of the grantor within the meaning of the Bankruptcy Act.³

§ 643. The following are the chief provisions of the new Act:—

I. Every bill of sale given by way of security is *absolutely void*, unless—

1. Made in accordance, *i.e.*, *substantially* in accordance, with the form in the schedule annexed to the Act (sect. 9).

The object of the statute, as carried out by this section, is twofold: 1st, that the borrower may understand the nature of the security which he is about to give for the debt due from him; and 2dly, that a creditor upon merely searching the register may be able to understand the position of the

¹ *Ex parte Cotton*, 11 Q. B. D. 210; *Reeves v. Barlow*, 11 Q. B. D. 801.

² *Swift v. Pannell*, 24 Ch. D. 210.

³ *Swift v. Pannell*, 24 Ch. D. 210.

borrower, and may not be compelled to go to a solicitor in order to get counsel's opinion as to the meaning of a security already created by the borrower.¹

The form in the schedule, which is very carelessly framed, contains a covenant for the repayment of the principal sum advanced, with interest thereon, distributed *ratably* over the period during which the bill of sale runs, and it provides that the chattels assigned shall not be liable to seizure, or to be taken possession of for any cause other than those specified in the 7th section. Accordingly the Court of Appeal has recently held a bill of sale to be void, which provided that upon breach by the grantor of any of the covenants contained therein all moneys secured thereby, including the principal sum borrowed, and the *capitalized* interest thereon, should be at once paid to the grantee. The bill of [*488A] sale * also contravened the provision of sect. 7, by including causes of seizure additional to, and varying from, those mentioned in that section.²

2. Duly attested, that is to say, attested by one or more credible witnesses, not being a party or parties thereto (sects. 8 and 10).

Sect. 10 repeals sect. 10, sub-s. 1, of the Act of 1878 (*ante*, p. 478), and renders attestation and explanation by a *solicitor* no longer necessary. Decisions under the earlier Act, to which we have already referred,³ had rendered this attempted safeguard of no value.

3. Registered under the Act of 1878 within seven clear days, if executed in England, or where the execution has taken place out of England, within seven clear days after the bill of sale would have reached England in course of post, if posted immediately after its execution (sect. 8).

This section is not retrospective, and does not therefore invalidate an unregistered bill of sale executed more than seven clear days before the Act came into operation.⁴

¹ See *per* Brett M. R. in *Davis v. Burton*, 11 Q. B. D. at p. 539.

³ See *ante*, p. 480.

² *Davis v. Burton*, 11 Q. B. D. 537, C. A.; affirming s. c. 10 Q. B. D. 414.

⁴ *Hickson v. Darlow*, 23 Ch. D. 690; *Swire v. Cookson*, 48 L. T. N. S. 877.

4. The consideration which, as under the Act of 1878, must be truly set forth,⁵ is at least 30%. (sects. 8 and 12).

§ 644. II. Every bill of sale given by way of security is to be *void, except as against the grantor*, in respect of any personal chattels:—

1. Comprised in the bill of sale, and not specifically described in the schedule annexed thereto (sect. 4);
2. Specifically described in the schedule, but of which the grantor was not the “true owner” at the time of the execution of the bill of sale (sect. 5).

* Growing crops actually growing at the time of [*489] the execution of the bill of sale, and fixtures, plant, or trade machinery substituted for any of the like fixtures, plant, or machinery specifically described in the schedule, are excepted from the operation of sects. 4 and 5 (sect. 6).

The object of these sections seems to be to prevent a person for the future from contracting to assign after-acquired property to the detriment of his creditors. Under the earlier Acts assignments were continually made of after-acquired property, and especially of stock-in-trade, which might at any time during the continuance of the security be upon the debtor's premises, and applying the rule laid down in equity in *Holroyd v Marshall*,¹ it was held in several cases that such assignments operate to give a title to stock-in-trade acquired after the date of the bill of sale.²

§ 645. III. Personal chattels assigned under a bill of sale given by way of security are only to be liable to seizure by the grantee for any of the five following causes (sect. 7):—

1. Default in payment of the sum secured at the due date, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security;

⁵ See the cases under the earlier Act, collected at pp. 474 *et seq.*

¹ 10 H. L. C. 191; *ante*, p. 80. As to the way in which equity viewed these contracts to assign, see *per Jessel, M. R.* in *Collyer v. Isaacs*, 19 Ch. D. at p. 351, C. A.

² *Leatham v. Amor*, 26 W. R. 739; 47 L. J. Q. B. 561; *Lazarus v. Andrade*, 5 C. P. D. 318; but the charge must relate to specified property, *Belding v. Reed*, 3 H. & C. 955; *Re D'Epineuil*, 20 Ch. D. 758.

2. The bankruptcy of the grantor, or his suffering the goods to be distrained for rent, rates, or taxes.

It is difficult to see how it was intended to give effect to the right of seizure upon the bankruptcy of the grantor, seeing that by virtue of the repeal contained in sect. 15 the goods are in that event within the grantor's order and disposition and pass to his trustee.

It is very important, however, to remember that sect. 44, sub-sect. 3, of the new Bankruptcy Act, 1883, which [*489A] is *cited *ante*, p. 468, only applies when the goods are "in the possession, order, or disposition of the bankrupt *in his trade or business*." It follows, therefore, that furniture and other household goods forming the subject-matter of so many bills of sale will, for the future, not pass to the bankrupt's trustee, unless they happen to form part of the bankrupt's stock-in-trade. The grantee of a bill of sale over chattels of this description will, therefore, be entitled to seize them under this section on the grantor's bankruptcy, and to this extent the repeal contained in sect. 15 of the Bills of Sale Act, 1882, would appear to be avoided by the operation of the Bankruptcy Act.

3. The grantor's fraudulently removing or suffering the goods to be removed from the premises;
4. The grantor's failure, *without reasonable excuse*, to produce upon the *written* demand of the grantee his last receipt for rent, rates, and taxes.

The effect of this provision is not to authorize a seizure upon the mere non-payment of rent. Thus, where it is the custom for the landlord not to demand, and the tenant not to pay, the rent until some time after it falls due, the tenant has in the interval a reasonable excuse for the non-production of the receipt for the rent.³

A covenant by the grantor that he will produce the receipts on the grantee's demand "in writing *or otherwise*," which would permit of a verbal demand, will invalidate the bill of sale.⁴

5. Execution levied on the goods under a judgment.

³ *Ex parte Cotton*, 11 Q. B. D. 301.

⁴ *Davis v. Burton*, 11 Q. B. D. 537, C. A.

And even where seizure has taken place for any one of the foregoing causes, the Court, or a judge may, on the application of the grantor, within five days from the seizure, restrain the grantee from removing or selling the goods, if satisfied that by payment or otherwise the cause of seizure no longer exists (sect. 7); and in order to give time for such an * application, the goods seized are not to be removed [*490] or sold until the expiration of five clear days from the seizure (sect. 13).

Since sect. 13, as to seizure and removal, applies to chattels comprised in any bill of sale, whether registered before or after the commencement of the Act, an application or order may be made under sect. 7 to restrain a sale of goods comprised in a bill of sale registered under the Act of 1878.⁵

The Court of Appeal has construed this section very strictly in deciding that the inclusion in the bill of sale of an unauthorized cause of seizure, or one which is inconsistent with those authorized, is fatal to its validity.⁶

The Act contains a number of minor provisions.

By sect. 11, the local registration in the County Courts of abstracts of bills of sale to which the Act applies, in addition to the registration in London under the Act of 1878 is provided for. By sect. 14, a bill of sale to which the Act applies is to be no protection in respect of personal chattels included therein against poor and parochial rates; and by sect. 16, the right to inspect and take extracts from registered bills of sale is defined and limited.

The stringent provisions of this Act to which the Courts have already evinced a determination to give the strictest interpretation, have gone far to destroy the security hitherto afforded by bills of sale, and the rapid and continuing diminution in the number of bills of sale registered since the Act came into operation testifies to the want of confidence which is now naturally felt in this class of securities.

§ 646. It is to be observed that neither the statutes of Elizabeth nor the earlier Bills of Sale Acts rendered

⁵ *Ex parte Cotton*, 11 Q. B. D. 301.

⁶ *Davis v. Burton*, 11 Q. B. D. 537, C. A.

[*491] the contract * void *between the parties*,¹ and the 8th section of the Act of 1878 carefully enumerates those third persons who shall remain unaffected by the contract, where the forms and requisites rendered necessary by the Act have not been complied with. Without these provisions, however, it would not be competent to either party to impeach the provisions of such a contract on the ground that it was intended as a fraud on creditors,² for the general principle of law that no man shall set up his own fraud as the basis of a right or claim for his own benefit would clearly apply.³ But even as to creditors, such conveyances are not *void*, but *voidable*, and the creditors must, as in all analogous cases, elect whether they will treat their debtor's conveyance as valid or defeasible. If the transferee makes a conveyance to a *bonâ fide* third person for a valuable consideration, before the bill of sale is impeached by creditors as being in fraud of their rights, the title of such *bonâ fide* third person will not be disturbed.⁴ But the assignee for value of a bill of sale is not protected as a *bonâ fide* third person unless he renew the registration within the five years, as required by 29 & 30 Vict. c. 96.⁵

¹ *Davis v. Goodman*, 5 C. P. D. 128, C. A., overruling Div. Ct. *ibid.* 20.

² *Bessey v. Windham*, 6 Q. B. 166; *Doe d. Roberts v. Roberts*, 2 B. & Ald. 367.

³ *Ibid.* *Philpotts v. Philpotts*, 10 C. B. 85; 20 L. J. C. P. 11.

⁴ *Morewood v. South Yorkshire Railway Co.*, 3 H. & N. 799; 28 L. J. Ex. 114.

⁵ *Karet v. Kosher Meat Supply Association*, 2 Q. B. D. 361.

A *fraudulent transfer*, although void as to creditors, is valid between the parties. *Ybarra v. Lorenzana*, 53 Cal. 197; *Burleigh v. White*, 64 Me. 23; *Harvey v. Varney*, 98 Mass. 118; *Mudge v. Oliver*, 83 Mass. (1 Allen) 74; *Gary v. Jacobson*, 55 Miss. 204; s. c. 30 Am. Rep. 514; *Maher v. Swift*, 14 Nev. 324; *Evans v. Herring*, 27 N. J. L. (3 Dutch.) 243; *Ruckman v. Ruckman*, 32 N. J. Eq. (5 Stew.) 259;

Allison v. Hogan, 12 Nev. 38; *Phipps v. Boyd*, 54 Pa. St. 342; *Boyle v. Rankin*, 22 Pa. St. 168, 170; *Telford v. Adams*, 6 Watts (Pa.) 429, 434; *Brooks v. Martin*, 69 U. S. (2 Wall.) 70; bk. 17, L. ed. 732.

Who may impeach fraudulent conveyance. — 1. *Existing creditors.* — Voluntary conveyances are void as to existing creditors. *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481; s. c. 8 Am. Dec. 250. But such evidence is not fraudulent *per se* *Pence v. Croan*, 51 Ind. 336; *Gwyer v. Figgins*, 37 Iowa, 517; *Place v. Rhem*, 7 Bush (Ky.) 588; *Grant v. Ward*, 64 Me. 239; *Warner v. Dove*, 33 Md. 579; *Lerow v. Wilmarth*, 91 Mass. (9 Allen) 386; *Wilson v. Kohlheim*, 46 Miss. 346; *Seward v. Jackson*, 8 Cow. (N. Y.) 406; *Thacker v. Saunders*, Busb. (N. C.) Eq. 145; *Arnett v. Wanett*, 6 Ired. (N. C.) L. 41; *Clark v. Depew*,

§ 647. The Act of 1882 has made an important change in this respect. It repeals the 8th section of the Act of 1878,

25 Pa. St. 509; s. c. 64 Am. Dec. 717; Greenfield's Estate, 14 Pa. St. 489; Posten v. Posten, 4 Whart. (Pa.) 27; Nicholas v. Ward, 1 Head (Tenn.) 323; s. c. 73 Am. Dec. 177; Hester v. Wilkinson, 6 Humph. (Tenn.) 215; s. c. 44 Am. Dec. 303; Dewey v. Long, 25 Vt. 564; Brackett v. Waite, 4 Vt. 389; Hoxie v. Price, 31 Wis. 82; Smith v. Vodges, 92 U. S. (2 Otto) 183; bk. 23, L. ed. 481.

2. *Subsequent creditors.* — Conveyances made to defraud existing creditors is generally held fraudulent as to subsequent creditors. Nicholas v. Ward, 1 Head (Tenn.) 323; s. c. 73 Am. Dec. 177.

As to where voluntary conveyance is fraudulent as to subsequent creditors, see Huggins v. Perrine, 30 Ala. 396; s. c. 68 Am. Dec. 131; Hinton v. Nelms, 13 Ala. 222; s. c. 48 Am. Dec. 103; Elliott v. Horn, 10 Ala. 348; s. c. 44 Am. Dec. 488; Dodd v. McCraw, 3 Eng. (Ark.) 83; s. c. 46 Am. Dec. 301; Rucker v. Abell, 8 B. Mon. (Ky.) 566; s. c. 48 Am. Dec. 406; Lewis v. Love's Heirs, 2 B. Mon. (Ky.) 845; s. c. 38 Am. Dec. 161; Crosby v. Ross's Adm'r, 3 J. J. Marsh. (Ky.) 290; s. c. 20 Am. Dec. 140; Bangor v. Warren, 34 Me. 324; s. c. 56 Am. Dec. 657; Clark v. French, 23 Me. 221; s. c. 39 Am. Dec. 618; Spring v. Hight, 22 Me. 408; s. c. 39 Am. Dec. 587; Bullitt v. Taylor, 34 Miss. 708; s. c. 69 Am. Dec. 412; Miles v. Richards, 1 Miss. (Walk.) 477; s. c. 12 Am. Dec. 584; Ladd v. Wiggan, 35 N. H. 421; s. c. 69 Am. Dec. 551; Satterthwaite v. Elmey, 4 N. J. Eq. (3 H. W. Gr.) 489; s. c. 43 Am. Dec. 618; Denn v. Sparks, 1 N. J. L. (Coxe) 356; s. c. 1 Am. Dec. 188; Jackson v. Town, 4 Cow. (N. Y.) 599; s. c. 15 Am. Dec. 40; Wood v. Jackson, 8 Wend. (N. Y.) 9; s. c. 22 Am. Dec. 603; Jones v. Young, 1 Dev. & B. (N. C.) L. 352; s. c. 28

Am. Dec. 569; Squires v. Riggs, 2 L. Repos. (N. C.) 274; s. c. 6 Am. Dec. 564; Lancaster v. Dolan, 1 Rawle (Pa.) 231; s. c. 18 Am. Dec. 625; Dougherty v. Jack, 5 Watts (Pa.) 456; s. c. 30 Am. Dec. 335; Howard v. Williams, 1 Bail. (S. C.) 575; s. c. 21 Am. Dec. 483; Blake v. Jones, 1 Bail. (S. C.) Eq. 141; s. c. 21 Am. Dec. 530; Hamilton v. Greenwood, 1 Bay (S. C.) 173; s. c. 1 Am. Dec. 607; Jenkins v. Clement, 1 Harp. (S. C.) Eq. 72; s. c. 14 Am. Dec. 698; Eigleberger v. Kibler, 1 Hill (S. C.) Eq. 113; s. c. 26 Am. Dec. 192; Hudnal v. Wilder, 4 McC. (S. C.) 294; s. c. 17 Am. Dec. 744; Hudnal v. Teasdall, 1 McC. (S. C.) 277; s. c. 10 Am. Dec. 671; Martin v. Olliver, 9 Humph. (Tenn.) 561; s. c. 49 Am. Dec. 717; Hester v. Wilkinson, 6 Humph. (Tenn.) 215; s. c. 44 Am. Dec. 303; Hutchinson v. Kelly, 1 Rob. (Va.) 123; s. c. 39 Am. Dec. 250. See Miller v. Miller, 23 Me. 22; s. c. 39 Am. Dec. 597; Cramer v. Reford, 17 N. J. Eq. (2 C. E. Gr.) 383; Holmes v. Clark, 48 Barb. (N. Y.) 237; Mead v. Gregg, 12 Barb. (N. Y.) 656; Watson v. Le Row, 6 Barb. (N. Y.) 490; Leschigk v. Addison, 3 Robt. (N. Y.) 349; Hutchinson v. Kelly, 1 Rob. (Va.) 123; s. c. 39 Am. Dec. 253; Lockhard v. Beckley, 10 W. Va. 105. But subsequent creditors stand upon a different footing from that of existing creditors as to their right to avoid voluntary conveyances. As to existing creditors, the fraud is an inference of law; but as to the latter, there must be fraud in fact. Kirksey v. Snedecor, 60 Ala. 192; Williams v. Avery, 38 Ala. 115; Huggins v. Perrine, 30 Ala. 396; Hall v. Sands, 52 Me. 355; Winchester v. Charter, 94 Mass. (12 Allen) 606; Parkman v. Welch, 36 Mass. (19 Pick.) 231; Carlisle v. Rich, 8 N. H. 44; Allaire v. Day, 30 N. J. Eq. (3 Stew.) 231;

above referred to, and renders any bill of sale given by way of mortgage *absolutely void*, unless it complies with the provisions contained in the 8th, 9th and 12th sections of the Act.

Under the statute of Elizabeth it was held in various cases that as the transfer was good not only between the parties, but as against strangers, not creditors, the sheriff would be held liable as a trespasser if he seized the goods on execution against the vendor, unless he put in evidence the writ to show that he was acting for a creditor;¹ and in [*492] *White v. Morris*,² it was held overruling *Bessey v.*

Windham,³ that it was necessary for the sheriff to produce, in evidence, the judgment as well as the writ, in order to defend himself in such cases.

A bill of sale being a security for a debt becomes void when the debtor has been released by a discharge in bankruptcy.⁴

Cook v. Johnson, 12 N. J. Eq. (1 Beas.) 51, 54; s. c. 72 Am. Dec. 381; *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481; s. c. 8 Am. Dec. 520; *Burdick v. Gill*, 2 McC. C. C. 486.

3. *An executor or administrator may impeach a conveyance for fraud.* See *Judson v. Connolly*, 4 La. An. 169; *Welsh v. Welsh*, 105 Mass. 229; *Tenney v. Poor*, 80 Mass. (14 Gray) 500; s. c. 77 Am. Dec. 340; *Chase v. Redding*, 79 Mass. (13 Gray) 413; *Holland v. Cruft*, 37 Mass. (20 Pick.) 331; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 154; *Martin v. Root*, 17 Mass. 22; *Morris v. Morris*, 5 Mich. 171; *Brown v. Finley*, 18 Mo. 375; *Cross v. Brown*, 51 N. H. 486; *Bate v. Graham*, 11 N. Y. 240; *Henderson v. Brooks*, 3 T. & C. (N. Y.) 448; *Loomis v. Tift*, 16 Barb. (N. Y.) 545; *Huntington v. Gilmore*, 14 Barb. (N. Y.) 248; *McKnight v. Morgan*, 2 Barb. (N. Y.) 171; *Babcock v. Booth*, 2 Hill (N. Y.) 181; s. c. 38 Am. Dec. 578; *Whitney v. Kenyon*, 7 How. (N. Y.) Pr. 458; *Bouslough v. Bous-*

lough, 68 Pa. St. 495; *Stewart v. Kearney*, 6 Watts (Pa.) 453; s. c. 31 Am. Dec. 482; *McLane v. Johnson*, 43 Vt. 48. *Contra Coltraine v. Causey*, 3 Ired. (N. C.) Eq. 246; s. c. 42 Am. Dec. 168; *Hart v. Rust*, 46 Tex. 574; *Hunt v. Butterworth*, 21 Tex. 133; *Connell v. Chandler*, 13 Tex. 5; s. c. 62 Am. Dec. 445; *Martin v. Martin*, 1 Vt. 91; s. c. 18 Am. Dec. 675.

4. *A wife may attack a fraudulent conveyance* (see *Feigley v. Feigley*, 7 Md. 537; s. c. 61 Am. Dec. 375), particularly where she has a judgment for alimony. *Chase v. Chase*, 105 Mass. 387.

¹ *Doe d. Roberts v. Roberts*, 2 B. & Ald. 367; *Bessey v. Windham*, 6 Q. B. 166; *Glave v. Wentworth*, 6 Q. B. 173, n.

² 11 C. B. 1015, and 21 L. J. C. P. 185.

³ See note (2), *ante*, p. 491.

⁴ *Thompson v. Cohen*, L. R. 7 Q. B. 527; *Cole v. Kernott*, *ibid.* 534; and see *Collyer v. Isaacs*, 19 Ch. D. 342, C. A.

Section VI. — FRAUD ON CREDITORS — FRAUDULENT PREFERENCE.

§ 648. Contracts of sale will also be avoided as fraudulent against creditors when made in furtherance of an attempt to disturb the principles on which the bankrupt and insolvent laws of the country are based, the object of these laws being to secure an equal ratable distribution of the debtor's property among his creditors. All contracts, including that of sale, are voidable as fraudulent when made for this purpose. In all contracts between an insolvent and his creditors, the law imports a tacit stipulation that all shall share alike, *pari passu*; and that it shall not be competent for any one of them, without the knowledge of the rest, to secure any benefit or advantage in which they have no share.¹

¹ Daughlish v. Tennent, L. R. 2 Q. B. 49; 36 L. J. Q. B. 10; Howden v. Haigh, 11 A. & E. 1033; Higgins v. Pitts, 4 Ex. 312; Wilson v. Ray, 10 A. & E. 82; Leicester v. Rose, 4 East, 371; Mallalieu v. Hodgson, 16 Q. B. 689; 20 L. J. Q. B. 339; Britten v. Hughes, 5 Bing. 460; Coleman v. Waller, 3 Y. & J. 212; Wells v. Girling, 1 B. & B. 447; Elliott v. Richardson, L. R. 5 C. P. 744. See, also, Jackson v. Duchaise, 3 T. R. 551, and Nunes v. Carter, L. R. 1 P. C. 342, for an instructive opinion of Lord Westbury, on the construction of statutes setting aside sales made in contemplation of bankruptcy. See, also, Whithall v. Young, 10 Low. Can. 149; Sharing v. Menier, 7 Low. Can. 250; Kalus v. Hergert, 1 Ont. App. 75; Bank of Toronto v. McDougall, 15 Up. Can. C. P. 475; Gottwalls v. Mulholland, 15 Up. Can. C. P. 62; In re Caton, 26 Up. Can. C. P. 308; Tuer v. Harrison, 14 Up. Can. C. P. 449; Ross v. Elliott, 11 Up. Can. C. P. 221; Feehan v. Lee, 10 Up. Can. C. P. 385; Hersee v. White, 29 Up. Can. Q. B. 232; Kerr v. Coleman, 6 Up. Can. Q. B. 218; Armour v. Phillips, 4 Up. Can. Q. B. 152.

Respecting sales in fraud of the

bankruptcy act or insolvency laws. See Gardner v. Commercial Bank, 95 Ill. 298; Van Patten v. Burr, 52 Iowa, 518; Jones v. Syer, 52 Md. 211; s. c. 26 Am. Dec. 366; Lincoln v. Wilber, 125 Mass. 249; Eldridge v. Phillipson, 58 Miss. 276; Guernsey v. Miller, 80 N. Y. 181; Hauselt v. Vilmar, 76 N. Y. 630; Getman v. Oswego Bank, 23 Hun (N. Y.) 498; Frazier v. Fredericks, 24 N. J. L. (4 Zab.) 162; Bentz v. Rockey, 69 Pa. St. 71, 76; s. c. 1 Am. L. Cas. 61; Zahm v. Fry, 10 Phila. (Pa.) 243; James v. Mechanics' Bank, 12 R. I. 460; Scott v. Alford, 53 Tex. 82; Frazer v. Thatcher, 49 Tex. 26; Sipe v. Earman, 26 Gratt. (Va.) 563, 566; Dance v. Seaman, 11 Gratt. (Va.) 778; Blennerhassett v. Sherman, 105 U. S. (15 Otto) 100; bk. 29, L. ed. 1080; Barbour v. Priest, 103 U. S. (13 Otto) 293; bk. 26, L. ed. 478; Auffmordt v. Rasin, 102 U. S. (12 Otto) 620; bk. 26, L. ed. 262; Rogers v. Palmer, 102 U. S. (12 Otto) 263; bk. 26, L. ed. 164; Grant v. National Bank, 97 U. S. (7 Otto) 80; bk. 24, L. ed. 971; Gottwalls v. Mulholland, 15 Up. Can. C. P. 62; affirmed, 3 E. & A. 194; Gordon v. Young, 12 Grant's Ch. (Ont.) 318.

§ 649. In this connection it may be useful to refer to a class of cases which will again come under consideration in the chapter treating of *Stoppage in transitu*. The equity in favor of returning goods to an unpaid vendor by a buyer who finds that he is insolvent, and will be unable to pay for them, is so strong in its appeal to the conscience of honest men, that cases have frequently arisen where the buyer, on becoming insolvent, has attempted to prevent the [*493] goods from being *fused into the common mass of assets by rejecting them, or rescinding the sale, and returning the goods.

§ 650. In some early cases, before the principles were well settled, countenance was given to the idea that a buyer might *rescind* a sale after its performance by the actual delivery of the goods into his possession, if the rescission was accomplished, and the goods returned to the vendor, before the buyer committed an act of bankruptcy. The earliest case on the subject was *Atkin v. Barwick*,¹ variously reported, and of which a full account was given by Lord Abinger in his dissenting opinion in *James v. Griffin*.² But although this case subsequently received countenance in *Alderson v. Temple*,³ in *Harman v. Fisher*,⁴ and various other cases, and was made the basis of the decision in *Salte v. Field*⁵ yet the *ratio decidendi* was constantly questioned, and it is now perfectly well settled that if the insolvent vendee has come into actual possession of the goods, he cannot *rescind* the contract and return the goods to the vendor, for that would be a clearly fraudulent preference in favor of the vendor. This was first distinctly held by Lord Kenyon and the King's Bench, in *Barnes v. Freeland*,⁶ almost immediately after the decision given by them in *Salte v. Field*,⁵ and the question now always turns upon the point whether — First, the buyer has left anything undone for the perfect

¹ 1 Stra. 165; 10 Mod. 432; Fortes. 353.

² 2 M. & W. 623-639.

³ 4 Burr. 2235.

⁴ Cowp. 117.

⁵ 5 T. R. 211.

⁶ 6 T. R. 80. See, also, *Neate v. Ball*, 2 East, 123; *Richardson v. Goss*, 3 B. & P. 119; *Heinecke v. Erle*, in Ex. Ch. 8 E. & B. 410; 28 L. J. Q. B. 79.

transfer of the *property* to himself, in which case, the sale being incomplete, he may honestly decline to complete it to the prejudice of his vendor; or, secondly, whether, although the transfer of the property be complete, the transit into his *possession* remains incomplete, in which event he may honestly refuse the possession, so as to leave to his vendor the right of stoppage *in transitu*, which will be equally available to the latter if he can accomplish it before the assignees get possession of the goods.

§ 651. *An instance of the first kind is given in [*494] *Nicholson v. Bower*,¹ where wheat was purchased by sample, and forwarded to the purchaser by railway, and on arrival at the railway warehouse, a bulk-sample was taken to the purchaser by his orders, and found to correspond, but the purchaser, knowing himself to be insolvent, told his carman, "Don't cart it home at present." The sale was by *parol*, and the impression of the judges evidently was, that the transit was at an end, so that the vendor's right of stoppage was gone: but the value being over 10*l.*, the sale was incomplete under the Statute of Frauds, unless the vendor had *accepted* as well as received the goods, and although it might be his duty to accept when he found that the bulk accorded with the sample according to his verbal agreement, yet if he chose not to accept, the sale was incomplete, and his object of returning the goods to his vendor would thus be accomplished. In the language of Erle J. in commenting on the buyer's action, "The meaning of all this seems to be this:— 'I will hold my hand: in honesty the wheat ought to go back as I cannot pay for it;' and he sends the next day a notice to the vendor, and is willing that it should get back to him, if by law it might. The bankrupt broke his contract, mayhap, by not accepting, but that does not show that there *was* an acceptance."²

¹ E. & E. 172; 28 L. J. Q. B. 97; and see *Richardson v. Goss*, 3 B. & P. 119; and *Ex parte Cote*, 9 Ch. 27.

American authorities.— *Seed v. Lord*, 66 Me. 580, 582; *Grout v. Hill*, 70 Mass. (4 Gray) 361; *Lane v. Jackson*, 5 Mass. 157; *Sturtevant v.*

Orser, 24 N. Y. 538, 544; *Clark v. Lynch*, 4 Daly (N. Y.) 83; *Greaner v. Mullen*, 15 Pa. St. 200, 206; *Clemson v. Davidson*, 5 Binn. (Pa.) 392; *Clark v. Bartlett*, 50 Wis. 543, 547.

² As to what amounts to a rescission of a contract by an insolvent

§ 652. But even if the *property* has passed, it may be that the *possession* is not yet obtained, and the buyer may then honestly reject it without exposing himself to the charge of giving an undue preference to one creditor over the others. The different cases in which buyers have adopted this course and thus kept unimpaired the vendor's right of stoppage *in transitu*, are referred to in the note.¹

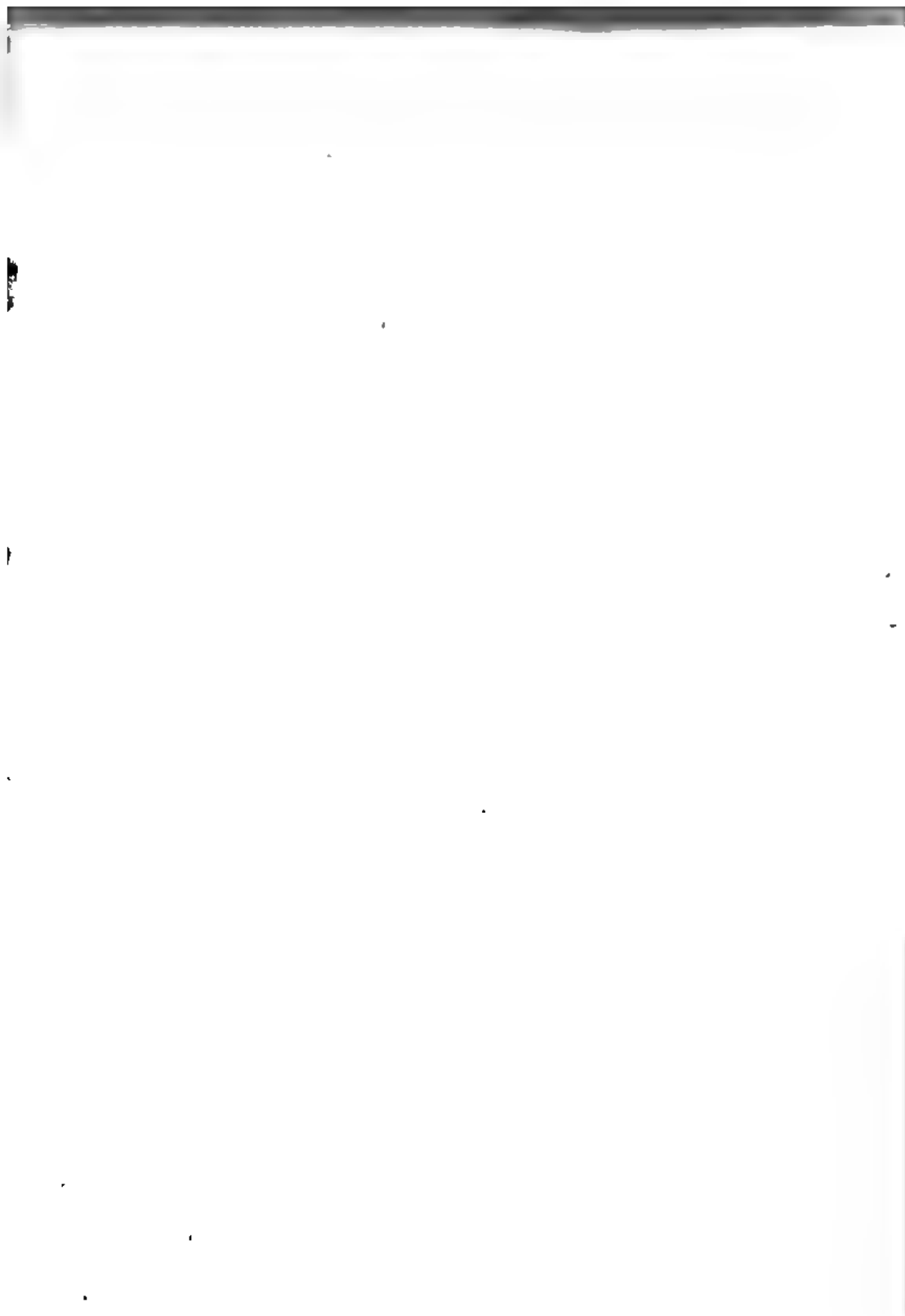
[*495] § 653. *The reader is also referred to a very singular case, that of *Dixon v. Baldwin*,¹ where the King's Bench decided that although the transit was at an end, and although both the property and possession were confessedly in the vendee, yet, under the special circumstances of the case, the buyer had not laid himself open to a charge of fraudulent preference by rescinding the contract, because it was done by advice of counsel, after a statement of his intention to do so, made to his creditors at a meeting called by him, and not done with the voluntary intention of giving an undue advantage. The judges were not unanimous, and the question was considered by the majority rather as one of fact than of law.

purchaser, see *Morgan v. Bain*, L. R. 10 C. P. 15.

¹ *Atkin v. Barwick*, 1 Str. 165; 10 Mod. 432; *Fortes*. 353; *Salte v. Field*, 5 T. R. 211; *Bartram v. Farebrother*, 4 Bing. 579; *Smith v. Field*, 5 T. R. 402; *James v. Griffin*, 2 M. & W. 623; *Siffken v. Wray*, 6 East, 371; *Heincke v. Erle & al.*, 28 L. J. Q. B.

79; and 8 E. & B. 410; *Bolton v. Lancashire and York Railway Co.*, L. R. 1 C. P. 431; 35 L. J. C. P. 137; *Whitehead v. Anderson*, 9 M. & W. at p. 529. See remarks of Parke B. in *Van Casteel v. Booker*, 18 L. J. Ex. 9, at p. 14; 2 Ex. 691, at p. 706.

¹ 5 East, 175.





3 6105 063 154 541

